UNITED STATES OF AMERICA	**)**	
	)	
v.	**)**	**Prosecution Response to**
	)	**Defense Motion to Dismiss**
Manning, Bradley E.	**)**	**for Lack of Speedy Trial**
PFC, U.S. Army,	**)**	
HHC, U.S. Army Garrison,	**)**	**CORRECTED COPY #2**
Joint Base Myer-Henderson Hall	**)**	
Fort Myer, Virginia 22211	**)**	**16 November 2012**

RELIEF SOUGHT

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests that the Court deny the Defense Motion to Dismiss for Lack of Speedy Trial (Defense Motion).

BURDEN OF PERSUASION AND BURDEN OF PROOF

When the defense moves to dismiss for lack of speedy trial, the burden of persuasion shall be upon the prosecution. *See* Rule for Courts-Martial (RCM) 905(c)(2)(B); *United States v. Cook*, 27 M.J. 212, 215 (C.M.A. 1988); *United States v. Mizgala*, 61 M.J. 122, 125 (C.A.A.F. 2005) ("Under Article 10, the government has the burden to show that the prosecution moved forward with reasonable diligence in response to a motion to dismiss."). The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. *See* RCM 905(c)(1).

WITNESSES/EVIDENCE

The prosecution requests that the Court consider witness testimony and the following enclosures to this response:

1. Unclassified Emails
2. Classified Emails
3. Article 32 transcript, Mr. Troy Bettencourt
4. Sworn Statement, Mr. Adrian Lamo
5. Military Magistrate Pretrial Confinement Review, 30 May 2010
6. Pretrial Confinement Order, 29 May 2010
7. Original Charged Sheet Preferred, 5 July 2010
8. CID Report of Investigation, 11 June 2010
9. CID Report of Investigation, 23 June 2010
10. Article 10 Memorandum, 20 November 2010
11. Requests for Excludable Delay
12. SPCMCA Approvals of Excludable Delay
13. GCMCA Transfer of Jurisdiction, 28 July 2010
14. Quantico Receipt of Inmate, 29 July 2010
15. Accused's Orders to Quantico, 28 July 2010
16. GCMCA Release of Jurisdiction, 2 August 2010

17. Prosecution's Request for FBI File, 15 August 2011
18. Discovery Productions
19. GCMCA Assumption of Command, 3 June 2011
20. Requests for Classification Reviews
21. Requests for Classification Reviews (classified)
22. Defense Request for RCM 706 Delay, 26 August 2010
23. Requests for Approval of Disclosure
24. Requests for Approval of Disclosure (classified)
25. Approvals of Disclosure
26. Forensic Reports (classified)
27. Article 32 Investigating Officer's Delay Recommendation, 12 August 2010
28. Accounting Memoranda of Excluded Delay
29. SPCMCA Order for RCM 706 to Resume, 3 February 2011
30. RCM 706 Board Extension Requests
31. SPCMCA Approval of Extension Requests
32. RCM 706 Sanity Board Results, 22 April 2011
33. Memorandum, 22 October 2010
34. RCM 706 Order, 3 August 2010
35. Defense Request for Expert Consultant in Forensic Psychiatry, 25 August 2010
36. Defense Request for Security Clearances, 2 September 2010
37. SPCMCA Protective Order for Classified Information, 17 September 2010
38. GCMCA Protective Order, 28 July 2010
39. Appointment of Defense Security Expert, 17 September 2010
40. Preliminary Classification Review Order, 17 September 2010
41. Defense Response to Preliminary Classification Review Order, 28 September 2010
42. Superseding Preliminary Classification Review Order, 22 September 2010
43. Appointment of Second Defense Security Expert, 12 October 2010
44. Proposed Meeting with Defense, 25 October 2011
45. Defense Request for Preliminary Classification Review, 21 October 2011
46. Defense Request for Information Assurance Expert, 28 October 2010
47. Defense Request for Damage Assessments, 1 November 2010
48. SPCMCA Guidance to Preliminary Classification Review, 10 November 2010
49. Preliminary Classification Review Results, 13 December 2010
50. Prosecution Request for Security Clearance for Defense Team, 13 January 2011
51. Classification Review, 15 December 2011
52. Prosecution's Preservation Requests
53. Prosecution's Prudential Search Requests
54. Prudential Search Requests (classified)
55. OGA Classification Review (ManningB_00410623) (classified)
56. Requests to Review Damage Assessments
57. Prosecution's *Ex Parte* Statement of Due Diligence (classified), 25 July 2012
58. MDW OPLAN BRAVO (filed under seal)
59. DD Form 457, 11 January 2012
60. Article 32 Investigating Officer Exhibit 52, 11 January 2012
61. Special Instructions for Article 32 Investigating Officer, 16 November 2011
62. Calendar of Contested Periods for RCM 707

63. Notice of Referred Charge Sheet, 3 February 2012
64. Defense Request for Release from PTC under RCM 305(g), 13 January 2011
65. SPCMCA request for Quantico Documents, 20 January 2011
66. SPCMCA Response to RCM 305(g) Request, 21 January 2011
67. SPCMCA Response to RCM 305(g) Request, 18 March 2011
68. Defense Discovery Requests
69. Prosecution's Responses to Defense Discovery Requests
70. Prudential Search Request (DHS), 25 October 2011
71. Defense Request for Additional Funding for Experts, 26 January 2012
72. CID Regulation (filed under seal)
73. Prudential Search Request (CYBERCOM), 3 July 2012
74. Defense Request to Compel and Produce Discovery
75. Combined Chat Logs (classified)
76. Defense Acknowledge of Meeting with Prosecution on 8 November 2011, 25 October 2011
77. RCM 706 Emails
78. COL Coffman Emails
79. Article 32 Emails
80. Additional Documents for COL Coffman's Testimony
81. Defense Emails

FACTS

On 9 January and 13 January 2011, the defense requested a speedy trial.

The parties stipulate that the following days count towards the RCM 707 speedy trial clock: (1) 28 May 2010 to 11 July 2010 (45 days); (2) 16 December 2011 to 23 December 2011 (8 days); (3) 3 January 2012 to 6 January 2012 (4 days); (4) 9 January 2012 to 3 February 2012 (26 days); and (5) 23 February 2012 (1 day).[1] The parties stipulate that these 84 days count towards the RCM 707 speedy trial clock. *See* Defense Motion, at 33.

The parties stipulate that the period of delay between 11 August 2010 and 3 March 2011 was properly excluded under RCM 707(c). *See* Defense Motion, at 34.

The parties dispute that the period of delay between the following dates was properly excluded under RCM 707(c): (1) 12 July 2010 to 10 August 2010; (2) 4 March 2011 to 15 December 2011; (3) 24 December 2011 to 2 January 2012; (4) 7 January 2012 to 8 January 2012; and (5) 3 February 2012 to 22 February 2012. *See* Defense Motion.

I: INTRODUCTION

The facts for this response are consolidated into roughly five different sections: (1) the accused's arrest until his transfer to the brig at Marine Corps Base Quantico (hereinafter

[1] The defense provides that the speedy trial clock under RCM 707 began on 29 May 2010, the date of pretrial confinement. The prosecution provides that the speedy trial clock began on 27 May 2010, the date of restraint.

"Quantico") and transfer of jurisdiction to the Military District of Washington; (2) the accused's arrival at Quantico until the completion of the RCM 706 sanity board (hereinafter the "sanity board"); (3) the process and completion of the sanity board until the charges were referred; (4) continuation of the prosecution and criminal investigation; and (5) referral until present day.

Each section outlines important events during a specified time period. In particular, each section highlights updates to the multiple criminal investigations, to include any WikiLeaks releases during that period, the process of discovery, to include seeking classification reviews and approvals to disclose classified information to the defense, and excluded delays during the period covered by the section. The sections are mostly chronological, although discrete issues linking multiple periods may be expanded upon in a particular section to provide narrative continuity.

The second section outlines the circumstances leading to the accused's arrest and confinement, and describes the beginning of the criminal investigation and its increase in scope with each WikiLeaks public release.

The third section discusses the events following the accused's transfer to the Military District of Washington (hereinafter "MDW"). During this time, Wikileaks disclosed thousands of compromised documents, thereby greatly expanding the scope of the investigation. Moreover, the continuing compromises resulted in additional government entities taking actions, to include, *inter alia*, determining the extent of the damage and the steps required for mitigation. The involvement of additional government agencies led to the discovery of additional evidence and the creation of additional discoverable information. As the scale of the government response increased, so did the coordination required to investigate, obtain classification reviews, and produce evidence in discovery.

The fourth section describes the delay resulting from the defense's request for an RCM 706 sanity board. In particular, this section sets forth the lengthy process that stemmed, in part, from issues of ensuring classified information remained protected.

The fifth section discusses the prosecution's activities and the continued criminal investigation following the sanity board until referral. Specifically, this section describes the continued work pertaining to discovering information, producing discovery, submitting prudential search requests, and obtaining classification reviews and approvals.

The sixth section lists the prosecution's activities following referral of charges. During this time, the prosecution finalized approvals for discovery and participated in extensive motions practice.

II: ARREST (27 May 2010 through 27 July 2010)

A. Admission to Adrian Lamo

On 18 February 2010, WikiLeaks released what was purported to be a classified Department of State (DOS) cable originating from the United States Embassy located in Reykjavik, Iceland. *See* Charge Sheet, Specification 14 of Charge II; *see also* Enclosure 3. On 15 March 2010, WikiLeaks released an additional purported classified document. *See* Charge Sheet, Specification 15 of Charge II; *see also* Enclosure 3. On 5 April 2010, WikiLeaks released "Collateral Murder," a purported video of a military operation that is the subject of Specification 2 of Charge II. *See* Charge Sheet; *see also* Enclosure 3.

On 25 May 2010, Mr. Adrian Lamo reported to the United State Government (hereinafter "USG") that he was online chatting with the accused, and the accused had admitted to disclosing thousands of classified documents to WikiLeaks, an organization that maintained a website dedicated to leaking compromised private and classified information owned by governments and other organizations. *See* Enclosure 4; *see also* Enclosure 5. In those chats, the accused (aka "bradass87") told Mr. Lamo, "lets just say *someone* i know intimately well, has been penetrating US classified networks, mining data like the ones described... and been transferring that data from the classified networks over the "air gap" onto a commercial network computer... sorting the data, compressing it, encrypting it, and uploading it to a crazy white haired aussie. *See* Enclosure 75 at 7. On 27 May 2010, the accused's command ordered the accused under arrest. Under supervision and requiring an escort, the accused "managed to hand a piece of paper with his email address and password to another Soldier and asked her to check his email for him." Enclosure 5. On 29 May 2010, the accused's command ordered the accused into pretrial confinement. *See* Enclosure 6. On 30 May 2010, a Military Magistrate approved the command's decision to confine the accused. The Military Magistrate made the following finding:

> PFC Manning remains a threat to national interests if released. PFC Manning indicated he collected declassified materials for over a year. It is unknown how much information he collected or how the information is stored. It is highly likely that if PFC Manning is released he will continue to commit physical acts of violence or leak additional classified information to the detriment of national interests.

Enclosure 5.

On 5 July 2010, the original charges were preferred. *See* Enclosures 7. MG Terry Wolff, Commander, 1st Armored Division, was the initial General Court-Martial Convening Authority (GCMCA) and COL David Miller, Commander, Headquarters, 2d Brigade Combat Team, 10th Mountain Division (Light Infantry), was the initial Special Court-Martial Convening Authority (SPCMCA) (hereinafter "SPCMCA#1").

B. Initial Investigation

The gravity of the accused's overall misconduct, the urgency to limit any further disclosures, and the eighteen months of ongoing public releases of the compromised documents by WikiLeaks significantly impacted the length of pretrial confinement. The accused entered

pretrial confinement as an All-Source Intelligence Analyst—accused of compromising hundreds of thousands of classified documents in a deployed setting. CPT Kevin Ley, the Part-Time Military Magistrate, determined pretrial confinement was warranted amid the confessions provided in the chat logs. *See* Enclosure 5. Pretrial restraint, though necessary to limit any further disclosures and justified given the accusations, triggered the speedy trial clock. *See* RCM 707. Thus, the prosecutorial and investigative arms of government were prevented from initially or fully investigating the accused's alleged misconduct prior to the accused's arrest.

Without knowing the full scope of the compromises, the prosecution first met with the United States Army Criminal Investigation Command (hereinafter "CID") to discuss its investigation into the charged misconduct. Through those discussions, the prosecution learned that other law enforcement organizations were conducting criminal investigations into the unauthorized disclosures, namely the Federal Bureau of Investigation (FBI) and the Diplomatic Security Service (DSS). *See* AE XCIX. Given the breadth and gravity of the accused's misconduct, all three organizations engaged in investigative activities at various times in this case. *See* Department of Defense Directive 5525.7. The DSS actually began investigating the unauthorized disclosure of information to WikiLeaks on 19 February 2010 as a result of the leak of 10Reykjavik13. Initially, CID was the primary law enforcement organization tasked with investigating the accused, with DSS responsible for leads involving DOS. *See* Enclosure 8. Much like the findings by the Military Magistrate, the infancy stage of this investigation focused on understanding exactly what the accused stockpiled, what the accused had disclosed, and the means by which he accomplished his criminal acts. *See* Enclosure 5; *see also* Enclosure 9.

C. Initial Discovery

The prosecution began working to facilitate discovery immediately, which required, *inter alia*, obtaining classification reviews. Directly following preferral of the original charges on 5 July 2010, the trial counsel in Iraq began reaching out to DOS and DOD for assistance in identifying the appropriate personnel to conduct classification reviews of the charged documents. *See* Enclosure 10. In July 2010, the trial counsel met with United States Army Criminal Investigation Command (CCIU) and DOJ in Wiesbaden, Germany to discuss the way forward. At that meeting, it was determined that DOJ (based on their ongoing relationships and experience with national security cases) would help facilitate the coordination for DOS and DOD information. *See id.*

On 28 July 2010, with coordination from DOJ, the trial counsel requested the assistance from DOD for classification reviews of classified documents. On 30 July 2010, the trial counsel was notified that DOD was coordinating with 1st Cavalry Division to facilitate the classification review of the video that is the subject of Specification 2 of Charge II. *See id.*

D. Excluded Delay (12 July 2010 – 16 August 2010)

On 12 July 2012, the defense requested a delay of the Article 32 investigation until a sanity board was completed and until the accused could resolve issues relating to civilian defense counsel and defense expert witnesses. *See* Enclosure 11. That same day, SPCMCA#1 granted the defense's request and excluded any delay until 16 August 2010. *See* Enclosure 12.

III: TRANSFER TO MDW (28 July 2010 through 22 April 2011)

On 28 July 2010, MG Terry Wolff transferred jurisdiction of the case to MG Karl Horst, Commander, United States Army Military District of Washington (MDW). *See* Enclosure 13. The Army Corrections Command transferred the accused to the brig at Marine Corps Base Quantico, Virginia on 29 July 2010. *See* Enclosures 14 and 15.

On 2 August 2010, MG Karl Horst released the preferred charges to COL Carl Coffman, Commander, United States Army Garrison, Joint Base Myer-Henderson Hall, as the SPCMCA (hereinafter "SPCMCA#2"). *See* Enclosure 16. Accordingly, on 2 August 2010, the accused and jurisdiction for this court-martial were transferred to MDW. *See id*. On 12 October 2010, SPCMCA#2 excluded the delay for the defense request for a sanity board. *See* Enclosure 28. SPCMCA#2 excluded the delay from 12 July 2010 until 12 October 2010. *See id.*

A. Initial WikiLeaks Public Releases

Beginning in early 2010, WikiLeaks publicly released documents allegedly compromised by the accused on a rolling basis spanning more than eighteen months. The continued public releases expanded the scale of ongoing criminal investigations and impact to national security, which affected the prosecution and the coordination to use evidence and disclose information in discovery.

On 25 July 2010, WikiLeaks released what were purported to be records from the Combined Information Data Network Exchange (CIDNE) Afghanistan database, totaling approximately 90,000 reports. *See* Enclosure 3. Those records are the subject of Specifications 6 and 7 of Charge II. *See* Charge Sheet. Shortly thereafter, the FBI agreed to participate jointly in the investigation to provide counterespionage expertise and investigative support, and Secretary Robert Gates directed the DIA to establish the Information Review Task Force to memorialize the damage caused by the disclosures. *See* Enclosure 1, at 0003, *infra*; *see also* Enclosure 4 to AE XLIX.

Over the summer of 2010, WikiLeaks released what was purported to be the information that is the subject of Specification 3 of Charge II. *See* Charge Sheet; *see also* Enclosure 3.

On or about 21 October 2010, WikiLeaks released what were purported to be records from the CIDNE Iraq database totaling approximately 390,000 reports. Those records are the subject of Specifications 4 and 5 of Charge II. *See id.*; *see also* Enclosure 3.

On or about 28 November 2010, WikiLeaks began releasing what were purported to be DOS cables that are the subject of Specifications 12 and 13 of Charge II. *See id.*; *see also* Enclosure 3.

B. Investigation Expands to Include Additional Partners

Each release by WikiLeaks, both prior to and after the case was transferred to MDW, altered and expanded the focus of the investigation. Toward the end of July and beginning of

August 2010, the prosecution met with the IRTF and FBI, both of whom were acting in new capacities in response to the Wikileaks compromises. *See* Enclosure 1, at 0011.

1. *FBI Agrees to Participate Jointly*

On or about 30 July 2010 and shortly after the CIDNE Afghanistan records were publicly released, the FBI agreed to participate jointly in the investigation to provide investigative support. *See* Enclosure 1, at 0003. On 19 April 2011, the prosecution submitted a written request to review the FBI files relevant to the accused. *See* Enclosure 17. On 27-29 April 2011 and 18 May 2011, and upon approval by the FBI, the prosecution conducted a cursory review of multiple FBI files.

2. *CID Investigation Incorporates Information Discovered Through the Information Review Task Force (IRTF)*

On 28 July 2010, shortly after CIDNE Afghanistan records were publicly released, Secretary of Defense Robert Gates directed DIA to establish the IRTF to determine what classified documents were posted on WikiLeaks, what other classified documents were compromised, and to memorialize what, if any, damage was caused by the compromised documents. *See* Enclosure 4 to AE XCIX. The prosecution met with the IRTF on many occasions to better understand its mission and what, if any, impact it will have on the court-martial. *See generally* Enclosure 1, at 0011.

C. Accused's Misconduct Spawns Multiple Army Investigations

There have been six administrative investigations relating to the accused's misconduct: (1) the Secretary of the Army AR 15-6 investigation (completed 14 February 2011); (2) the United States Forces-Iraq (USF-I) AR 15-6 investigation (completed 23 August 2010); (3) the United States Division-Center (USD-C) AR 380-5 investigation (completed 16 June 2010); and (4) and three military intelligence investigations. For those files, the prosecution immediately sought to review and produce said files to the defense. For example, once the prosecution learned the Secretary of Defense directed the Secretary of the Army to conduct an AR 15-6 investigation, the prosecution immediately inquired about the existence of this investigation and the scope of its inquiry. *See* Enclosure 1, at 0457. *Before the investigation concluded*, the prosecution reviewed the Secretary of the Army AR 15-6 investigation and requested authority to disclose the investigation to the defense. *See* Enclosure 1, at 0457.

The prosecution has disclosed to the defense all of the above investigations relating to the accused. The prosecution disclosed these files to the defense on the following dates: (1) the Secretary of the Army AR 15-6 investigation: 30 June 2011; (2) the USF-I AR 15-6 investigation: 12 May 2011; (3) the USD-C AR 15-6 investigation: 9 February 2011; and (4) and three military intelligence investigations: 3 October 2011, 8 November 2011, and 8 November 2011, respectively. *See* Enclosure 18.

D. Additional Charges Preferred

On 1 March 2011, additional charges were preferred against the accused. *See* Charge Sheet. On 18 March 2011, the original charges were dismissed. *See* Charge Sheet. On 3 June 2011, MG Michael Linnington assumed command of MDW, and as the GCMCA for this court-martial. *See* Enclosure 19.

E. Discovery and Beginning of Approval and Review Process

Continuing releases by WikiLeaks prompted government organizations with equities in the documents to focus significant attention and resources on determining the extent to which their equities were compromised. In some cases, the releases led to the discovery of additional evidence, such as audit log files, that required extensive coordination to produce in discovery; in other cases, the releases prompted organizations to take immediate steps to mitigate damage.

1. *Classification Reviews*

Before referral, a classification review is necessary to establish the classification of the evidence to meet an element of the charge. *See* Code 30 definition (stating that a classification review is a declaration by an OCA that he or she has reviewed the subject material and that the material was classified at a particular level at the time of the offense). The accused is charged with multiple violations of 18 U.S.C. 793 and 18 U.S.C. 641 relating to "classified" information. Therefore, obtaining a classification review for each of the charged documents was necessary to satisfy this element of the charged offenses for the Article 32 investigation and court-martial, and to ensure the proper handling and storage of information during discovery. A classification review is also generally necessary to determine an overriding interest, namely national security, in order for an investigating officer or military judge to close the courtroom under RCM 806(b)(2) and *Grunden*. *See* Code 30. Upon transfer of the accused to MDW, the prosecution continued the process of requesting classification reviews from various organizations. *See* Enclosures 20 and 21.

After additional charges were preferred, the prosecution memorialized its requests for OCAs to prepare classification reviews of the charged documents and evidence necessary for the Article 32 investigation. Pre-referral and in preparation for the Article 32 investigation, the prosecution requested classification review(s) of CENTCOM, OGA#1, DOS, SOUTHCOM, DISA, CYBERCOM, INSCOM, OGA#2, ODNI, and DOD. *See* Enclosures 20 and 21. Additionally, in a memorandum dated 26 August 2010, the defense requested the results of the classifications reviews by OCAs. *See* Enclosure 22.

The prosecution submitted formal requests for classification reviews as follows:

i. CENTCOM. On 18 March 2011, the prosecution submitted a written request to CENTCOM for classification reviews. *See* Enclosures 20-21.

ii. OGA#1. On 18 March 2011, the prosecution submitted a written request to OGA#1 for classification reviews. *See* Enclosures 20-21.

iii. DOS. On 18 March 2011, the prosecution submitted a written request to DOS for classification reviews. *See* Enclosures 20-21.

iv. SOUTHCOM. On 18 March 2011, the prosecution submitted a written request to SOUTHCOM for classification reviews. *See* Enclosures 20-21.

v. DISA. On 18 March 2011, the prosecution submitted a written request to DISA for a classification review of evidence it intended to use. *See* Enclosures 20-21.

vi. CYBERCOM. On 18 March 2011, the prosecution submitted a written request to CYBERCOM for a classification review of evidence it intended to use. *See* Enclosures 20-21.

vii. ODNI. On 18 March 2011, the prosecution submitted a written request to ODNI for a classification review of evidence it intended to use. *See* Enclosures 20-21.

viii. OGA#2. On 18 March 2011, the prosecution submitted a written request to OGA#2 for a classification review of evidence it intended to use. *See* Enclosures 20-21.

ix. DOD. On 30 November 2010, the prosecution submitted a written request to DOD for a classification review of evidence it intended to use. *See* Enclosures 20-21.

x. INSCOM. On 18 March 2011, the prosecution submitted a written request to INSCOM for a classification review of evidence it intended to use. *See* Enclosures 20-21.

2. *Approval to Disclose Charged Documents*

The prosecution also sought approval to disclose charged documents to the defense at the same time it requested classification reviews. The approval process began prior to the preferral of additional charges. *See* Enclosure 1, at 0305. In March 2011, the prosecution memorialized its requests in writing for consent to disclose classified information to the defense. *See* Enclosures 23 and 24.

The following OCAs were identified by the prosecution as authorized to approve disclosure of the charged documents to the defense:

i. Army G-2. On 14 March 2011, the prosecution submitted a written request to the Deputy Chief of Staff, Army G-2, for approval to disclose, *inter alia*, the DOD charged documents and classified evidence to the defense. *See* Enclosures 23 and 24. DOD approved the request on 30 March 2011. *See* Enclosure 1, at 0387.

ii. DOS. On 14 March 2011, the prosecution submitted a written request to DOS for approval to disclose, *inter alia*, DOS charged documents and other classified evidence to the defense. *See* Enclosures 23 and 24. On 29 March 2011, DOS approved the request. *See* Enclosure 25.

iii. OGA#1. On 14 March 2011, the prosecution submitted a written request to OGA#1 for approval to disclose, *inter alia*, OGA#1 charged documents and other classified evidence to the defense. *See* Enclosures 23 and 24. On 29 March 2011, OGA#1 approved the request.

3. *Approval to Disclose Classified Information, Including Evidence and Information from Criminal Investigations*

Because the vast majority of the accused's misconduct involved the use of Secret Internet Protocol Router Network (SIPRNET) computers, it was necessary to use classified information as evidence to prove the elements of many of the specifications. Thus, to ensure a thorough and impartial Article 32 investigation, the prosecution sought to disclose to disclose all evidence it intended to use at trial to the defense before the Article 32 investigation. Accordingly, the prosecution began reaching out to government organizations in the fall of 2010 for approval to disclose classified information to the defense in preparation for the Article 32 investigation. As part of the discovery process, the prosecution produced other pieces of classified information after coordination with, and the approval of, the different OCAs. This information generally falls within two sub-categories: digital media, including associated forensic reports and data extracted from the media; and audit data or "logs" collected from SIPRNET systems.

CID collected more than fifty individual digital media devices. *See* Enclosure 26. After initial forensic examination, CID determined that twenty-three contained relevant information pertaining to the accused, and accordingly completed a full forensic examination of these hard drives and removable media drives. *Id.* At least twenty of these devices contained classified information, and many contained the analytic work product of intelligence analysts. *Id.* Specifically, the SIPRNET work computers used by the accused and the accused's personal computer contained classified information owned by multiple federal organizations and OCAs.

Prior to producing forensic images of the collected drives, and the derivatively classified forensic reports, the prosecution was required to consult with each federal organization, and each organization's respective OCA, that had an equity in the drives. After conducting a due diligence search of the drives with the assistance of security experts, trial counsel sent requests for consent to produce classified information in discovery to the OCAs of the charged documents or information, and any other OCAs that could reasonably be identified during the search of the hard drives. Because classified information on the digital media was inextricably commingled, and alteration of the forensic image would have thwarted a useful forensic examination of the key evidence by the defense, trial counsel was required to obtain consent from all the relevant OCAs, either because they were the OCA of a charged document or because they were an OCA identified as a result of the due diligence search of the digital media. *See* Enclosures 23 and 24

Additionally, because the accused's misconduct involved the use of SIPRNET computers in Iraq, CID collected multiple sets of audit data (hereinafter "logs") for computer networks, databases, and systems. These logs were collected from five federal organizations. Many of the logs are completely classified, while others contain unclassified and classified information. Additionally, some of the logs contain search terms used on SIPRNET, which may also be classified.

The prosecution submitted formal requests for disclosure as follows:

i. OGA#2. On 14 March 2011, the prosecution submitted a written request to OGA#2 for approval to disclose classified evidence to the defense. *See* Enclosures 23 and 24.

ii. ODNI. On 14 March 2011, the prosecution submitted a written request to ODNI for approval to disclose classified evidence to the defense. *See* Enclosures 23 and 24.

iii. DISA. On 21 March 2011, the prosecution submitted a written request to DISA for approval to disclose classified evidence to the defense. *See* Enclosures 23 and 24. On 24 March 2011, DISA approved the request. *See* Enclosure 25.

iv. DIA. On 21 March 2011, the prosecution submitted a written request to DIA for approval to disclose classified evidence to the defense. *See* Enclosures 23 and 24. On 7 April 2011, DIA approved the request. *See* Enclosure 25.

v. DOS. On 14 March 2011, the prosecution submitted a written request to DOS for approval to disclose classified evidence to the defense. *See* Enclosure Enclosures 23 and 24. On 29 March 2011, DOS approved the request. *See* Enclosure 25.

vi. OGA#1. On 14 March 2011, the prosecution submitted a written request to OGA#1 for approval to disclose, *inter alia*, OGA#1 documents to the defense. *See* Enclosures 23 and 24. On 29 March 2011, OGA#1 approved the request. *See* Enclosure 25.

F. Excluded Delay (11 August 2010 – 22 April 2011)

On 11 August 2010, the defense requested that SPCMCA#2 delay the Article 32 investigation until completion of the sanity board. *See* Enclosure 11. On 12 August 2010, LTC Paul Almanza, the Article 32 Investigating Officer, (hereinafter the "Article 32 IO") recommended that SPCMCA#2 approve the defense delay request. *See* Enclosure 27. That same day, SPCMCA#2 approved the defense request. *See* Enclosure 12.

SPCMCA#2 not only approved the period of excluded delay in writing, but also accounted for the excluded delay in a series of monthly *accounting* memoranda. The relevant *accounting* memoranda, which included the periods of excluded delay and the bases for his decisions are below.

***Accounting* Memorandum, dated 12 October 2010**. On 12 October 2010, SPCMCA#2 memorialized that the period from 12 July 2010 up to and including 12 October 2010 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. Defense Request for Sanity Board, dated 11 July 2010 and Defense Renewed Request for Sanity Board, dated 19 July 2010.

c. Defense Request for Appointment of Expert with Expertise in Forensic Psychiatry to Assist the Defense, dated 25 August 2010.

d. Defense Request for Delay in Sanity Board to Comply with Prohibitions on Disclosure of Classified Information, dated 26 August 2010.

e. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

f. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

g. Preliminary Classification Review of the Accused's Mental Impressions, dated 17 September 2010, and Superseding Order, dated 22 September 2010.

h. Defense Response to the Preliminary Classification Review of the Accused's Mental Impressions, dated 28 September 2010.

See Enclosure 28.

***Accounting* Memorandum, dated 10 November 2010**. On 10 November 2010, SPCMCA#2 memorialized that the period from 12 October 2010 up to and including 10 November 2010 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. Defense Request for Sanity Board, dated 11 July 2010, and Defense Renewed Request for Sanity Board, dated 18 July 2010.

c. Defense Request for Delay in Sanity Board to Comply with Prohibitions on Disclosure of Classified Information, dated 26 August 2010.

d. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

e. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

f. Preliminary Classification Review of the Accused's Mental Impressions, dated 17 September 2010, and Superseding Order, dated 22 September 2010.

See Enclosure 28.

***Accounting* Memorandum, dated 17 December 2010.** On 17 December 2010, SPCMCA#2 memorialized that the period from 10 November 2010 up to and including 17 December 2010 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. Defense Request for Sanity Board, dated 11 July 2010, and Defense Renewed Request for Sanity Board, dated 18 July 2010.

c. Defense Request for Delay in Sanity Board to Comply with Prohibitions on Disclosure of Classified Information, dated 26 August 2010.

d. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

e. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

See Enclosure 28.

***Accounting* Memorandum, dated 14 January 2011.** On 14 January 2011, SPCMCA#2 memorialized that the period from 17 December 2010 up to and including 14 January 2011 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. Defense Request for Sanity Board, dated 11 July 2010, and Defense Renewed Request for Sanity Board, dated 18 July 2010.

c. Defense Request for Delay in Sanity Board to Comply with Prohibitions on Disclosure of Classified Information, dated 26 August 2010.

d. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

e. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

See Enclosure 28.

***Accounting* Memorandum, dated 15 February 2011.** On 15 February 2011, SPCMCA#2 memorialized that the period from 14 January 2011 up to and including 15 February 2011 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. Defense Request for Sanity Board, dated 11 July 2010, and Defense Renewed Request for Sanity Board, dated 18 July 2010.

c. Defense Request for Delay in Sanity Board to Comply with Prohibitions on Disclosure of Classified Information, dated 26 August 2010.

d. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

e. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

See Enclosure 28.

On 3 February 2011, SPCMCA#2 ordered the sanity board to complete its report within four weeks. *See* Enclosure 29. On 14 March 2011 and 15 April 2011, the sanity board requested a delay for submission of the completed report, which SPCMCA#2 approved. *See* Enclosures 30 and 31; Enclosure 1, at 0356 and 0407. SPCMCA#2 excluded the delay until 22 April 2011. *See id.* The sanity board completed its report on 22 April 2011. *See* Enclosure 32. Again, SPCMCA#2 not only approved the period of excluded delay in writing, but also accounted for the excluded delay in a series of monthly accounting memoranda.

***Accounting* Memorandum, dated 18 March 2011.** On 18 March 2011, SPCMCA#2 memorialized that the period from 15 February 2011 up to and including 18 March 2011 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. OCA consent to disclose classified information.

c. Defense Request for Sanity Board, dated 11 July 2010, and Defense Renewed Request for Sanity Board, dated 18 July 2010.

d. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

e. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

f. RCM 706 Sanity Board Extension Request, dated 14 March 2011.

See Enclosure 28.

***Accounting* Memorandum, dated 22 April 2011.** On 22 April 2011, SPCMCA#2 memorialized that the period from 18 March 2011 up to and including 22 April 2011 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. OCA consent to disclose classified information.

c. Defense Request for Sanity Board, dated 11 July 2010, and Defense Renewed Request for Sanity Board, dated 18 July 2010.

d. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

e. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

f. RCM 706 Sanity Board Extension Request, dated 14 March 2011.

g. RCM 706 Sanity Board Extension Request, dated 15 April 2011.

See Enclosure 28.

IV: RCM 706 SANITY BOARD (11 July 2010 – 22 April 2011)

On 11 July 2010, the defense requested that SPCMCA#1 appoint a sanity board. *See* Enclosure 11 (stating the defense request that the sanity board consist of three members, including at least one psychiatrist and one clinical psychologist). SPCMCA#1 denied that request. On 12 July 2010, the defense renewed its request to delay the Article 32 investigation until, *inter alia*, the completion of the sanity board. *See* Enclosure 11 (stating an additional defense request that SPCMCA#1 delay the Article 32 investigation until the accused has decided whether he will obtain the services of a civilian counsel, the civilian counsel is properly prepared for the Article 32 investigation, computer forensic experts are appointed to the defense, and such experts have ample time to review of forensic evidence). On 12 July 2010, SPCMCA#1 approved the defense's request to delay the Article 32 investigation. *See* Enclosure 12.

While the prosecution moved the case forward by, *inter alia*, advising CID in its ongoing investigation of the accused and coordinating with organizations in order to begin the classification review and discovery process , the prosecution also established and facilitated the accused's RCM 706 sanity board.

A. Establishing the Sanity Board

Before the defense submitted a request for a sanity board, the prosecution took steps to locate both a behavioral health provider and proper facility to conduct the sanity board. *See* Enclosure 33. On 1 July 2010, the trial counsel in Iraq contacted medical personnel at Europe Regional Medical Command and Landstuhl Regional Medical Center to begin coordination for the sanity board and to identify a provider. *See id.* On 11 July 2010, upon receipt of defense's request, the trial counsel contacted the USD-C Division Psychiatrist for assistance locating a provider to conduct the sanity board. *See id.* The USD-C Division Psychiatrist contacted the USF-I Deputy Surgeon to task a provider to conduct the board. *See id.* The USF-I Deputy Surgeon recommended that trial counsel contact CENTCOM. *See id.*

On 12 July 2010, trial counsel reengaged the USF-I Deputy Surgeon who responded that no one was available to conduct the sanity board due to the time requirements. *See id.* LTC Maureen Kohn, Deputy Staff Judge Advocate, USD-C/1AD, contacted the USF-I Deputy Staff Judge Advocate (DSJA) for assistance. *See id.* The USF-I DSJA contacted the USF-I Surgeon who responded that the accused was outside his area of operation and he could not task a provider. *See id.*

On 13 July 2010, the Third Army/USARCENT Staff Judge Advocate (SJA) recommended that the accused be transferred to an appropriate facility as soon as possible, even without a sanity board in place, because the Commanding General, USD-C/1AD (MG Terry Wolff) had ordered that the accused be transferred from the Theater Field Confinement Facility (TFCF) in Kuwait due to its lack of resources to provide the specialized mental care necessary for the accused. *See id.*

From 13-15 July 2010, LTC Kohn worked to transfer the accused to the Mannheim Area Confinement Facility. *See id.* The facility was unable to take the accused. Army Corrections Command recommended that the accused be transferred to the Army Regional Confinement Facility at Joint Base Lewis-McChord, Washington. *See id.* Similar to the Mannheim facility, the accused could not be transferred to that facility either. *See id.*

On 28 July 2010, MG Terry Wolff transferred jurisdiction of the court-martial to MG Karl Horst. *See* Enclosure 13. The Army Corrections Command transferred the accused to the brig at Marine Corps Base Quantico, Virginia on 29 July 2010. *See* Enclosures 14 and 15.

On 2 August 2010, MG Karl Horst released the preferred charges to SPCMCA#2. *See* Enclosure 16. Accordingly, on 2 August 2010, the accused and jurisdiction for this court-martial were transferred to MDW. *See id.*

On 3 August 2010, SPCMCA#2 ordered a sanity board based on the defense counsel request in Iraq. *See* Enclosure 34. On 5 August 2010, the defense notified the prosecution and the sanity board that the accused would not divulge any classified information during the sanity board. *See* Enclosure 1, at 0016. The sanity board was scheduled to be completed by 20 August 2010. *See* Enclosure 34.

1. *Classified Measures*

On 25 August 2010, the accused retained Mr. David Coombs as civilian counsel. *See* Enclosure 1, at 0051. On 25 August 2010, the sanity board notified the defense that it would begin its assessment of the accused on 27 August 2010. *See* Enclosure 35. On 25 August 2010, the defense requested that SPCMCA#2 delay the sanity board until the GCMCA appointed a forensic psychiatry expert to the defense team. *See* Enclosure 35. That same day, SPCMCA#2 approved the defense request to delay the sanity board until the GCMCA takes action on the defense request for appointment of a forensic psychiatry expert consultant. *See* Enclosure 12.

On 25 August 2010, the GCMCA granted the defense request, and CAPT Kevin Moore was appointed as a member of the defense team. *See* Enclosure 11. The defense requested CAPT Moore "be permitted to evaluate and work with [the accused] prior to the RCM 706 board and that [CAPT Moore] be permitted to monitor the examinations conducted by members of the board." *See* Enclosure 29.

On 26 August 2010, the defense requested a delay of the sanity board "until procedures can be adopted to safeguard any classified information that will be discussed during the board's determination." Enclosure 11.[2] Notwithstanding the previous proffer by the defense that the accused would not need to discuss classified information, the defense proffered that the accused would need to divulge classified information at the Top Secret-Sensitive Compartmented Information (TS-SCI) level. *See id.* The defense requested that "all members of the [sanity] board possess the requisite security clearances and that all required steps [be] taken in order to safeguard the information that they receive from [the accused]." *Id.*

On 26 August 2010, the defense requested the appointment of a security officer to the sanity board. *See id.*

On 2 September 2010, the defense requested that any expert appointed to the defense team possess a TS-SCI clearance. *See* Enclosure 36.

On 17 September 2010, SPCMCA#2 re-issued a Protective Order governing classified information. *See* Enclosures 37 and 38. That same day, SPCMCA#2 appointed Mr. Charles Ganiel as a defense security expert consultant and as a security officer for the sanity board. *See* Enclosure 39.

[2] On 12 October 2010, SPCMCA#2 excluded the delay for the defense request for a sanity board. *See* Enclosure 28. Based on the defense request in Iraq, SPCMCA#2 excluded the delay from 12 July 2010 until 12 October 2010. *See* Enclosure 28.

2. *Preliminary Classification Review of Accused's Mental Impressions*

On 17 September 2010 and based on the defense's proffer, SPCMCA#2 ordered a Preliminary Classification Review of the accused's mental impressions (PCR). *See* Enclosure 40. SPCMCA#2 ordered the accused to meet with the defense security expert consultant who would conduct a preliminary classification review of information the accused wished to disclose and provide a brief summary to the parties. *See id.* On 18 September 2010, the defense objected to SPCMCA#2's Order and filed a response to SPCMCA#2's Order. *See* Enclosure 1, at 0076.

Based on the defense request and discussions between defense counsel and the prosecution, on 22 September 2010, SPCMCA#2 ordered a superseding PCR, directing the accused to meet with the defense security expert consultant no later than 8 October 2010. *See* Enclosure 42. SPCMCA#2 explained that the "sole purpose of this [PCR] is to provide the defense and United States with a basis for granting security clearances to the defense team and the accused's behavioral health providers, and determining the appropriate level of classification for the RCM 706 board." *Id.*

On 28 September 2010, the defense requested that the PCR take place in a Sensitive Compartmented Information Facility (SCIF) and that the accused be given access to classified information. *See* Enclosure 41. Additionally, the defense requested a proper security container to store classified information, and a second defense security expert. *See id.* The defense also notified SPCMCA#2 that verifying the classification level of information is a "time consuming process that [the security expert] [did] not believe can be completed with the time restrictions listed in the [PCR]." *Id.*

Based on the defense's representations on the amount of time required for one security expert, on 12 October 2010, SPCMCA#2 appointed Mr. Cassius Hall as an additional defense security expert consultant and as a security officer for the sanity board. *See* Enclosure 43. SPCMCA#2 also ordered the PCR to take place in a SCIF. *See* Enclosure 29.

On 19 October 2010, the prosecution conducted a rehearsal of the accused's movement from Quantico to the Field Investigative Unit (FIU) SCIF and the procedures within FIU during the PCR. *See* Enclosure 1, at 0093.

On 19 October 2010, the defense notified the prosecution that the security experts believed that a two-week time period was unrealistic to complete the verification process. *See* Enclosure 1, at 0099.

On 21 October 2010, the defense security consultants, through defense counsel, requested several materials, to include any documentation the accused signed dealing with information security, the entirety of the accused's training records, and a TS-SCI stand-alone system with a removable hard drive. *See* Enclosure 45.

On 28 October 2010, the defense requested an information assurance expert be appointed to the defense team. *See* Enclosure 46.

On 1 November 2010, the defense security consultants requested the damage assessments conducted by the OCAs, the Security Classification Guide used to classify the information, and the government computer link to the video that was allegedly released by the accused. *See* Enclosure 47.

On 10 November 2010, SPCMCA#2 provided supplemental guidance on the defense expert consultant's access to classified information and information systems while assisting the defense team. *See* Enclosure 48. Additionally on 19 November 2010, the prosecution produced in classified discovery the USCENTCOM and MNF-I security classification guides in response to the defense request. *See* Enclosures 1, at 0143, and 18.

On 13 December 2010, the defense security expert consultants completed their preliminary classification review and concluded that: (1) the information provided by the accused was classified at a level above Secret; and (2) the information was within SCI compartments, namely Gamma, HUMINT, and SIGINT. *See* Enclosure 49.

3. *Security Clearances for RCM 706 Sanity Board and Defense Counsel*

Based on the results of the preliminary classification review, on 13 January 2011, the prosecution requested that the Army G-2 grant the sanity board members, CAPT Moore, Mr. David Coombs, military defense counsel, among others, the appropriate security clearances and access to classified information up to the TS-SCI level. *See* Enclosure 50. The Army G-2 granted each member of the defense team the proper security clearance level (TS) and read-on requirements (SCI), to include the lead civilian defense counsel, Mr. David Coombs, on 31 January 2011. *See* Enclosure 1, at 0242.

B. RCM 706 Sanity Board Resumed

On 3 February 2011, SPCMCA#2 ordered the sanity board to resume the medical examination into the mental capacity and mental responsibility of the accused and for the board to consist of three members. *See* Enclosure 29. Based on the defense's specific request, SPCMCA#2 also ordered the senior member of the board "to determine the extent to which [CAPT Moore] may participate in the sanity board's inquiry." *Id.* Further, in light of defense's proffer that the accused would likely need to divulge classified information at the TS-SCI level, SPCMCA#2 adopted the following additional security procedures: (1) issuance of a Protective Order governing classified information; (2) requiring the sanity board to conduct any discussions with the accused in a SCIF; and (3) other security measures, to include the proper storage of any classified notes.

SPCMCA#2 ordered the sanity board to consider, at a minimum, the results of psychological and neurological tests, the accused's mental health and medical records, interviews with the accused, and the charge sheet. *See id.* In response to the defense's specific request, SPCMCA#2 also ordered the sanity board "to complete a comprehensive neurological examination to include a CAT scan." *Id.*

The accused's pretrial confinement at Quantico, coupled with the media attention arising from the WikiLeaks releases, caused safety concerns with transporting the accused from Quantico to the SCIF. It was determined that transporting the accused to a government facility on a weekend would reduce, both any transportation concerns (e.g. traffic), any media attention that may jeopardize the accused's safety. *See* Enclosure 1, at 0320. Additionally, a weekend meeting ensured that the accused could enter and leave without any unnecessary attention from government personnel working in or around the designated SCIF at Headquarters, U.S. Army Intelligence and Security Command.

On 3 March 2011, defense requested to meet with the accused in a SCIF prior to accused's sanity board interview. *See* Enclosure 1, at 0319. The prosecution started to arrange this meeting and determined that the upcoming weekend was the soonest available and would ensure no delay in the interview. *See id.* On 7 March 2011, the defense counsel requested the prosecution to have a SCIF ready on 25 and 26 March 2011 in order to save money on flights. *See* Enclosure 1, at 0330.

On 7 February 2011, the defense emailed the sanity board and indicated that the board "should feel free to take the time necessary to conduct a thorough and complete examination of PFC Manning." *See* Enclosure 1, at 0258. The defense viewed the four week suspense date for completion of the board as "aspirational," and encouraged the board to submit a request for an extension of time through the trial counsel, as "[u]ndoubtedly, any request for an extension of time by the board would be granted." *Id.*

On 14 March 2011, the sanity board agreed to arrange an appointment for a brain imaging and neurological examination of the accused. *See* Enclosure 1, at 0344.[3]

On 14 March 2011, the sanity board requested an extension for completion of its report because of the necessity to conduct portions of the evaluation in a Sensitive Compartmented Information Facility (SCIF). *See* Enclosure 30. The sanity board notified SPCMCA#2 that it anticipated the interview of the accused to take place by 10 April 2011. *See id.* On 18 March 2011, SPCMCA#2 approved the sanity board's request and ordered the completion of the report by 16 April 2011. *See* Enclosure 31.

On 23 March 2011, the accused had an MRI and was seen by a neurologist, LTC Swanberg. *See* Enclosure 1, at 0354. The sanity board interviewed the accused on Saturday, 9 April 2011, in a SCIF. *See* Enclosure 30.

On 15 April 2011, the sanity board requested an extension to complete its report. *See id.* On 15 April 2011, the sanity board notified SPCMCA#2 that the board was "nearing finalization of the report, but [] had limited availability to meet as a full board to discuss the report." *Id.* Finalizing the report required all three board members to submit their portion of the report and to

[3] In spring 2011, faced with the potential furlough of government employees, the prosecution arranged for the civilian employees necessary for the sanity board, namely the sanity board members and defense security experts, to be identified as an "emergency" employee, so that the sanity board could resume, even if there was a government shutdown. *See* Enclosure 1, at 0399.

review and approve the report in its entirety. On 15 April 2011, SPCMCA#2 approved the sanity board's request for an additional week to complete its report. *See* Enclosure 31.

On 22 April 2011, the sanity board concluded and made its findings. *See* Enclosure 32.

V: INVESTIGATION AND PROSECUTION CONTINUES (22 April 2011 through 2 February 2012)

A. Additional WikiLeaks Releases

On or about 24 April 2011, WikiLeaks began releasing what were purported to be classified documents relating to detainees at the Guantanamo Bay detention facility. *See* Enclosure 3.

On or about 1 September 2011, WikiLeaks released more than 250,000 purported DOS cables in unredacted form. *See* Enclosure 3.

B. Continued Discovery

Each release by WikiLeaks between 18 February 2010 and 1 September 2011 resulted in a widespread reaction by each of the affected organizations, particularly those of the Intelligence Community. Most, if not all, organizations involved in this case reviewed the released information immediately to determine, *inter alia*, whether its information was compromised and, if so, what, if any, immediate curative measures must be taken—a task in addition to conducting normal business operations and searching for, and preserving, records responsive to the prosecution's requests, as explained below. Further, many organizations prepared a damage assessment to memorialize, *inter alia*, what, if any, damage was caused by the releases.

During this period, the prosecution continued to seek approvals to provide discovery to the defense. The prosecution disclosed the CID case file and FBI case files relevant to the accused. *See* Enclosure 18. Proactively, the prosecution submitted prudential search requests to multiple government organizations. The requests were designed to prompt these organizations and agencies to gather potentially discoverable information relating to the accused and WikiLeaks and to preserve such information for review by the prosecution as a prophylactic measure and should the case go to court-martial. Additionally, the prosecution continued working to obtain classification reviews.

1. *CID*

The CID case file consists of investigative and forensic sub-files that are both classified and unclassified. The investigative file consists of classified and unclassified material. On 25 July 2010, the prosecution disclosed the majority of the unclassified CID case file to the defense. *See* Enclosure 18. Near the end of April 2011, the prosecution became aware that the unclassified CID case file may contain potentially classified information. The prosecution, therefore, coordinated with the Department of the Army G-2 office (hereinafter the "Army G-2

office") to review the file for any classified material. *See* Enclosure 2, 0085. The Army G-2 office determined there was potentially classified information in the unclassified file and identified the two equity holders of that information. *See id.* In March 2011, *inter alia*, the prosecution requested that those two equity holders review the applicable portions of the case file for classified material. *See* Enclosure 11. In mid-September 2011, the prosecution received a classification listing from OGA#2 of information in the CID case file. *See* Enclosure 2. The release of that information was subsequently approved, and on 26 October 2011, the prosecution received the final information to properly mark the documents. These documents were released to the defense on 17 November 2011. *See* Enclosure 18. As this is an ongoing investigation, the prosecution has released additional information as CID has released it. The prosecution has also produced all forensic reports related to the investigation and prepared by CCIU in this case, which required extensive coordination with individual OCAs. *See infra* III(E)(3); Enclosure 18.

The CCIU forensic files in this case contain classified information originating from multiple government organizations. In total, CCIU completed 22 forensic reports. CCIU completed forensic reports relating to multiple pieces of classified evidence in this case, to include the accused's personal computer and external hard drive, the SIPR computers assigned to the accused at FOB Hammer, the accused's Secure Digital (SD) card, and evidence from various audit logs and the CENTCOM server. The forensic reports also included information from Intelink logs which, by themselves, contain classified information with multiple equity holders. *See* Enclosure 51. On 4 October 2011, the prosecution received the final version of the CCIU forensic reports. *See* Enclosure 1, at 0672.

2. *FBI*

On 19 April 2011, 28 July 2011, and 15 August 2011, the prosecution requested approval to disclose to the defense the FBI case file and its sub-files relevant to the accused.[4] *See* Enclosure 17. Based on coordination with DOJ and the FBI, the FBI provided the prosecution with a copy of the FBI file relating to the accused on 25 August 2011 for the sole purpose of reviewing for *Brady* information. On 2 January 2012, the prosecution requested a meeting with the FBI, among others, to discuss discovery. *See* Enclosure 1, at 0810. On or about 1 February 2012, the prosecution completed its review of the FBI file relating to the accused. On 7 February 2012, the prosecution then began extensive negotiations with DOJ and FBI to disclose all requested information to the defense. *See* Enclosure 1, at 0867. The FBI would not approve disclosure to the defense, absent a military judge to issue a Protective Order. *See* Enclosure 1, at 0451.

On 16 March 2012, the Court entered the Protective Order governing classified information. *See* AE XXXII. That same day, consistent with the FBI's prerequisite for disclosure, the prosecution disclosed the first wave of the approved FBI file to the defense, and the remaining information on 12 April 2012, 15 May 2012, and 21 May 2012. *See* Enclosure 18.

[4] These requests were in addition to the prudential search and preservation request submitted to the FBI on 27 June 2011.

3. *Preservation Requests*

On 30 September 2010, CID requested that the command to which the accused was assigned preserve "any *additional* hard drives used during the deployment to Iraq." Enclosure 24 to AE XVI (emphasis added). Based on the defense's preservation request, dated 21 September 2011, on 4-6 October 2011, the prosecution submitted specific preservation request to several organizations for the following information: (1) 2d Brigade Combat Team, 10th Mountain Division (Light Infantry), Fort Drum, New York, the command to which the accused was assigned, to search and preserve all hard drives used during the accused's deployment; (2) CID, to search and preserve any computer forensic evidence held or obtained during the investigation of the accused; (3) United States Army Central (ARCENT), to search and preserve all theater provided equipment (TPE) hard drives used during the accused's deployment; and (4) FBI, to preserve any computer forensic evidence held or obtained during the investigation of the accused. *See* Enclosures 52 and Enclosure 9 to AE XVI.

4. *Prudential Search Requests*

Through various meetings and discussions related to the investigation of the accused, the prosecution learned that other government organizations may have records or information pertaining to the accused or the accused's misconduct. The prosecution initially identified approximately thirteen organizations that likely possessed records or documents pertaining to the accused and/or WikiLeaks, based either on the organization's relationship to the compromised documents or the organization's ownership of evidence that could potentially be used by the prosecution in its case-in-chief. Those organizations are as follows: (1) CID; (2) FBI; (3) DOS, to include DSS; (4) Department of Justice (DOJ); (5) Other Government Agency #1 (OGA#1); (6) Office of the Director of National Intelligence (ODNI); (7) Defense Intelligence Agency (DIA); (8) Defense Information Systems Agency (DISA); (9) DOD; (10) Office of the National Counterintelligence Executive (ONCIX); (11) Other Government Agency #2 (OGA#2); (12) Department of Homeland Security (DHS); and (13) Drug Enforcement Administration (DEA).

Beginning in May 2011, the prosecution, *sua sponte*, began formally requesting that the above organizations search for, preserve, and disclose to the prosecution any records relating to the accused (hereinafter "Prudential Search Request"), based on the new charges and the organization's processing previous requests. *See* Enclosures 53 and 54. Before submitting a Prudential Search Request to an organization, the prosecution met with attorneys from the organization, multiple times, to advise them of the forthcoming request, to explain the purpose of the request (potential discovery obligations), and to answer any questions about the possible scope of the information requested. On 10 May 2011, for example, the prosecution met with DOD to discuss the forthcoming request. *See* Enclosure 1, at 0453. Many of the organizations in the Intelligence Community had experience responding to Prudential Search Requests, although not in a case involving this volume of information, nor involving the concurrent release of classified information. Some of the other organizations, however, had no experience with Prudential Search Requests and no automated systems or any process in place to locate and gather records or documents in an efficient manner for a criminal prosecution.

The Prudential Search Requests were submitted proactively. The Prudential Search Requests asked each organization to: (1) "conduct a thorough and comprehensive search of its records for information which concerns or references PFC Manning and/or WikiLeaks, including certain information…which directly implicates the evidence" in this court-martial; and (2) "take all reasonable and necessary steps to preserve any responsive files gathered as a result of [its] search for information." *See*, e.g., Enclosure 53. The prosecution sent subsequent requests to organizations that it later learned may have records relating to the accused and/or WikiLeaks. The prosecution included any records relating to WikiLeaks to capture, *inter alia*, any documents that discussed the damage resulting from the unauthorized disclosures. The prosecution, both formally in writing and informally through emails and in meetings, requested many updates on the status of the search. *See* Enclosures 1, at 0530, 53, and 54.

5. *Headquarters, Department of the Army*

On 25 May 2011 and again on 6 June 2011, the prosecution submitted a Prudential Search Request to DOD, which included HQDA. *See* Enclosures 53. Subsequent meetings, telephone conversations, and email correspondence ensued to explain the Prudential Search Request and DOD's response thereto. *See* Enclosure 1, at 0530, 0550, 1195, 0940, 0993, 1139. On 19 July 2011, the prosecution met with the DOD Office of the General Counsel (OGC) to discuss the Prudential Search Request and the requirement that it be executed immediately. *See id*. On 8 August 2011, the prosecution followed up with DOD OGC and learned the request was distributed on 29 July 2011. *See* Enclosure 1, at 0587.

On 7 September 2011, the prosecution requested an update from DOD OGC, who advised the prosecution to contact the Joint Staff directly to receive all future replies. *See* Enclosure 1, at 0638. On 3 October 2011, the Joint Staff notified the prosecution that it compiled all the responsive material. Between the middle of October 2011 and the start of the Article 32 investigation on 16 December 2011, the prosecution began to process the voluminous material into its computer systems and understand what information needed to be reviewed.

After realizing the Joint Staff and DOD response did not include material from HQDA, the prosecution contacted DOD OGC on 5 January 2012, who advised the prosecution to contact HQDA directly to speed up the process. *See* Enclosure 1, at 0819. On 10 January 2012, the prosecution emailed Criminal Law Division, Office of the Judge Advocate General, United States Army (hereinafter "OTJAG") to request an update, and was informed that OTJAG needed to contact DOD OGC for the inquiry. *See* Enclosure 1, at 0827. On 2 February 2012, the prosecution again emailed OTJAG to request an update. *See* Enclosure 1, at 0865.

6. *Classification Reviews*

i. CENTCOM. In addition to its 18 March 2011 request, on 28 July 2011, the prosecution submitted a written updated request for classification reviews. *See* Enclosures 20 and 21. On 7 September 2011, the prosecution submitted a written updated request for classification reviews. *See id*. On 6 October 2011 and 18 October 2011, the prosecution submitted a written updated request for classification reviews. *See id.* On 21 October 2011, the prosecution received classification reviews for all charged documents applicable to CENTCOM.

On 8 November 2011, the prosecution produced those classification reviews to the defense. *See* Enclosure 18.

ii. OGA#1. In addition to its 18 March 2011 request, on 6 May 2011, the prosecution submitted a written request for another classification review. *See* Enclosures 20 and 21. On 28 July 2011, the prosecution submitted a written updated request for classification reviews. *See* Enclosures 20 and 21. On 7 September 2011, the prosecution submitted a written updated request for classification reviews. *See* Enclosures 20 and 21. On 31 October 2011, the prosecution received classification reviews for the charged documents applicable to OGA#1. On 8 November 2011, the prosecution disclosed that classification review to the defense. *See* Enclosure 18.

On 9 September 2011, INSCOM completed a review of the charged document that is the subject of Specification of Charge II and determined that the document did not contain INSCOM equities; however, the document contained equities of other agencies, which warranted further review. *See* Enclosure 2, at 0127. On 16 September 2011, the prosecution submitted a written request for a classification review of the same charged document. *See* Enclosures 20 and 21. On 2 December 2011, the prosecution received the classification review for the charged document that is the subject of Specification 15 of Charge II. *See* Enclosure 55. The prosecution disclosed that classification review to the defense.

iii. DOS. In addition to its 18 March 2011 request, on 28 July 2011, the prosecution submitted a written updated request for classification reviews. *See* Enclosures 20 and 21. On 7 September 2011, the prosecution submitted a written updated request for classification reviews. *See* Enclosures 20 and 21. On 6 October 2011, the prosecution submitted a written updated request for classification reviews. *See* Enclosures 20 and 21. On 30 October 2011, the prosecution received classification reviews for the DOS charged documents applicable to DOS. On 8 November 2011, the prosecution disclosed that classification review to the defense. *See* Enclosure 18.

iv. SOUTHCOM. In addition to its 18 March 2011 request, on 28 July 2011, the prosecution submitted a written updated request for classification reviews. *See* Enclosures 20 and 21. On 4 August 2011, 7 September 2011, and 6 October 2011, the prosecution submitted a written updated request for classification reviews. *See* Enclosures 20 and 21. On 4 November 2011, the prosecution received classification reviews for the SOUTHCOM charged documents. On 17 November 2011, the prosecution disclosed that classification review to the defense. *See* Enclosure 18.

v. CYBERCOM. In addition to its 18 March 2011 request, on 28 July 2011, the prosecution submitted a written updated request for a classification review. *See* Enclosures 20 and 21. On 28 July 2011, the prosecution received the classification review from CYBERCOM. On 8 November 2011, the prosecution disclosed that classification review to the defense. *See* Enclosure 18.

vi. ODNI. In addition to its 18 March 2011 request, on 28 July 2011, the prosecution submitted a written updated request for a classification review. *See* Enclosures 20 and 21. On 7

September 2011, the prosecution submitted a written updated request for a classification review. *See* Enclosures 20 and 21 (the prosecution attached a memorandum explaining speedy trial in the military justice system). On 13 October 2011, the prosecution submitted a written updated request for a classification review. *See* Enclosures 20 and 21. On 15 December 2011, the prosecution received the ODNI classification review.[5] The ODNI classification review was complicated because it involved equities belonging to various IC elements. On 12 January 2012, the prosecution disclosed that classification review to the defense. *See* Enclosure 18. The Article 32 investigation commenced the following day, 16 December 2011.

7. *Approval to Disclose Classified Charged Documents*

In order to ensure a thorough and impartial Article 32 investigation, the prosecution sought to disclose all evidence it intended to use at trial to the defense before the Article 32 investigation. Pre-referral, in total, the prosecution requested approvals from the Army G-2, (the proper authority for all DOD subcomponents), OGA#1, DOS, DIA, DISA, OGA#2, and ODNI.

The OCAs authorized to approve disclosure of the charged documents to the defense are the Army G-2 office, DIA, DOS, FBI, and OGA#1.

The prosecution submitted formal requests for disclosure of classified information:

i. Army G-2. In addition to its 14 March 2011 request, on 23 June 2011 and 4 August 2011, the prosecution submitted a written updated request for approval to disclose DIA classified information contained within other charged documents. *See* Enclosures 23 and 24. On 26 October 2011, the prosecution submitted an updated written request for approval to disclose all outstanding DOD classified information, identified at that time as relevant to the case, to the defense. *See id.*

ii. DIA. On 23 June 2011, the prosecution submitted a written request to DIA for approval to disclose DIA classified information contained within other charged documents. *See* Enclosures 23 and 24. On 4 August 2011, the prosecution submitted a written updated request for approval to disclose the charged documents to the defense. *See* Enclosures 23 and 24.

iii. DOS. On 29 March 2011, DOS approved the prosecution's request to disclose classified information to the defense. *See* Enclosure 25.

iv. FBI. On 23 June 2011, the prosecution submitted a written request to the FBI for approval to disclose FBI classified information contained within other charged documents. *See* Enclosures 23 and 24. On 4 August 2011, the prosecution submitted an update request for approval. *See* Enclosures 23 and 24.

[5] The ownership of the classified system from which the evidence was derived changed from ODNI to another government organization during ODNI's on-going classification review. Nevertheless, ODNI endeavored to complete the classification review instead of requiring the gaining organization to start the review anew.

v. OGA#1. In addition to its 14 March 2011 request, on 6 May 2011, the prosecution submitted a written request to OGA#1 for approval to disclose OGA#1 classified information contained within other charged documents. *See* Enclosures 23 and 24. On 23 June 2011 and 11 August 2011, the prosecution submitted a written updated request for approval to disclose the charged documents to the defense. *See* Enclosures 23 and 24.

8. *Approval to Disclose Classified Evidence*

As part of the discovery process, the prosecution produced classified evidence, in addition to the charged documents, after coordination with, and the approval of, the different OCAs. This information generally falls within two sub-categories: digital media, including associated forensic reports and data extracted from the media; and audit data or "logs" collected from SIPRNET systems.

i. OGA#2. In response to the prosecution's request dated 14 March 2011, OGA#2 approved disclosure of classified information to the defense on 28 April 2011. *See* Enclosure 25. The prosecution also coordinated with OGA#2 for the production of the unclassified CID case file. *See supra*.

ii. ODNI. In response to the prosecution's request dated 14 March 2011, ODNI approved the request on 12 July 2011.

iii. DISA. On 24 March 2011, DISA approved the request. *See* Enclosure 25.

iv. DIA. On 7 April 2011, DIA approved the request. *See* Enclosure 25.

v. DOS. On 29 March 2011, DOS approved the request. *See* Enclosure 25.

vi. OGA#1. In addition to its 14 March 2011 request, on 6 May 2011, the prosecution submitted a written request to OGA#1 for approval to disclose OGA#1 classified information contained within other charged documents. *See* Enclosures 23 and 24. On 23 June 2011 and 11 August 2011, the prosecution submitted a written updated request for approval to disclose the charged documents to the defense. *See* Enclosures 23 and 24. The prosecution also coordinated with OGA#1 for the production of the unclassified CID case file. *See supra*.

9. *Approval to Disclose Classified Damage Assessments*

Given the widespread USG reaction to the accused's misconduct, multiple government organizations produced damage assessments to memorialize any damage caused by the unauthorized disclosures. On 6 October 2011, the prosecution submitted written requests to DOS, FBI, ODNI, OGA#1, and OGA#2 to review any alleged damage assessments. *See* Enclosure 56. Many of those damage assessments were classified, and many of those damage assessments, particularly those produced by the Intelligence Community, contained classified information synthesized from other government organizations. Disclosing those damage assessments to the defense required significant interagency coordination.

i. IRTF Final Report. On 29 July 2011, the IRTF completed its Final Report. *See* Enclosure 1 to AE CXXXII. On 25 October 2011, the prosecution requested approval to disclose the classified IRTF Final Report to the defense. *See* Enclosure 56. DIA reviewed the report and identified multiple government organizations with equities in the report. The prosecution coordinated with the government organizations, along with DIA, for approval to disclose the entire report to the defense. *See* Enclosure 18. After prior requests, the prosecution moved the Court to approve a substitution on 18 May 2012. *See* Appellate Exhibit CXXXII.

ii. ONCIX Damage Assessment.

On 13 January 2011, an attorney advisor to DIA, Mr. Kenneth Miller, assisted the prosecution with coordinating a meeting between the prosecution and ONCIX to discuss ONCIX's charter to provide the President and Congress with a damage assessment from the WikiLeaks releases. *See* Enclosure 57.

On 2 February 2011, the prosecution first met with ONCIX to discuss the damage assessment process. ONCIX notified the prosecution of its task to prepare a damage assessment on behalf of the United States Government and of its written request for input from other government organizations. ONCIX informed the prosecution that it sent letters to each organization with a series of questions designed to measure what, if any, damage resulted from the WikiLeaks releases. *See* Enclosure 57.

Based on the infancy of the ONCIX damage assessment, on 18 February 2011, the prosecution sought assistance from ONCIX to retrieve the individual damage assessments of those government organizations from which ONCIX requested input. ONCIX advised the prosecution that approval from the other government organizations was necessary, since many of the individual assessments themselves were classified. *See* Enclosure 57.

On 1 March 2011, the prosecution met with the Mr. Stephen Dillard, Deputy ONCIX, to further discuss the role of ONCIX. *See* Enclosure 57.

On 21 April 2011, the prosecution sent an email to Mr. Dillard requesting copies of the letters ONCIX disseminated to each non-DoD agency. The prosecution explained that such letters would expedite the process of submitting a request to each individual organization through the proper point of contact. *See* Enclosure 57.

On 25 May 2011, the prosecution submitted a PSR to ONCIX. *See* Enclosure 53.

On 2 June 2011, ONCIX notified the prosecution that its damage assessment team would like to brief the prosecution on the status of its review. *See* Enclosure 57.

On 13 June 2011, the prosecution met with ONCIX to discuss the PSR and receive a briefing on the tentative findings of their analysts. No actual products were discussed and it was relayed to the prosecution that no interim assessment was completed or near completion. Based on the information the prosecution received, the prosecution asked ONCIX if it could provide the

prosecution with copies of all the individual assessments in an effort to streamline the discovery process. *See* Enclosure 57.

On 14 July 2011, ONCIX notified the prosecution that it would need authorization from the other government organizations to retrieve those organizations' individual assessments. *See* Enclosure 57.

On 25 August 2011, the prosecution scheduled a conference call with ONCIX to discuss what would be required for the prosecution to retrieve the individual assessments from the other government organizations and what, if anything, ONCIX could provide voluntarily. *See* Enclosure 57.

On 22 September 2011, the prosecution had a meeting with ONCIX to receive an update from its analysts and to receive an update on the production of the damage assessment. At this meeting, it was explained to members of the prosecution that the damage assessment was in working draft form. *See* Enclosure 57.

On 11 October 2011, and after attempting to contact the different federal organizations, the prosecution requested the names and contact information for each organization that contributed to the ONCIX damage assessment. On 14 October 2011, ONCIX provided the prosecution with such information. *See* Enclosure 57.

On or about 1 November 2011, the prosecution began to reach out to individuals on the ONCIX contact list in order to obtain copies of the damage assessments. After referral and on 27 February 2012, the prosecution dedicated a single paralegal to reach out to each federal organization and obtain the information through cold-calls and appearances at their headquarters. This new process was effective, and after approximately a month, the paralegal was able to obtain the super-majority of the documents for the prosecution's review. At that point, a trial counsel then followed up with the identified point of contact in order to obtain approval to release in discovery. *See* Enclosure 57.

Based on the discovery litigation in February 2012, the prosecution reached out to ODNI and ONCIX to clarify what information does or does not exist at ONCIX in reference to their damage assessment. On 6 March 2012, the prosecution received the following response from ODNI on behalf of ONCIX:

> To date, ONCIX has not produced any interim or final damage assessment in this matter. ONCIX is tasked with preparing a damage assessment. However, that draft damage assessment is currently a draft and is incomplete and continues to change as information is compiled and analyzed. Damage assessments can take months or even years to complete, and given the sheer volume of disclosures in this case we do not know when a draft product will be ready for coordination, must less dissemination.

See Enclosure 57.

Without direct access to ONCIX documents, except what had been provided by ONCIX to assist the prosecution in contacting various organizations, the prosecution relied on the information provided by ODNI to respond to discovery requests and used the ODNI response, verbatim, to address the Court's inquiries.

The prosecution was not provided ONCIX's draft damage assessment, in any form, during its review of information provided by ODNI in response to the PSR. ODNI and ONCIX did not authorize the prosecution to review any documents, with the exception of the documents and information listed above, prior to the draft damage assessment being made available for review subject to the Court's order. On 13 July 2012, the prosecution reviewed the ONCIX draft damage assessment for the first time. *See* Enclosure 57.

D. Presentation to the Defense

On 8 November 2011, the prosecution presented a detailed overview of the evidence. Specifically, the prosecution explained to the defense team, in detail, how it intended to prove each charged offense, and a general overview of its sentencing case, namely the damage caused by the accused's misconduct. *See* Enclosure 44. On or around 10 November 2011, the defense requested that the prosecution provide this presentation to the accused. *See* Enclosure 1, at 0707. On 18 November 2011, the prosecution presented its merits and sentencing case to Mr. Coombs and to the accused. The substance of the prosecution's case remains the same to this day.

E. OPLAN BRAVO

MDW created an Operation Plan (hereinafter "OPLAN BRAVO") to help facilitate the planning, support, and execution throughout the different phases and legal procedures in this case. OPLAN BRAVO was drafted with the purpose of synchronizing all efforts and requirements between (1) Headquarters, Department of the Army, (2) MDW, (3) Fort Meade, (4) Fort Leavenworth, (5) Fort Belvoir, and (6) other government agencies. OPLAN BRAVO consisted of those requirements pertaining to the personal security and travel of the accused, requirements of the operational area, to include personnel, transportation of witnesses and parties involved in this case, physical infrastructure, information technology and equipment, security of personnel and facilities, threat assessments, and several other factors that affected the execution of this high visibility case. OPLAN BRAVO continues to support this case and will continue until the completion of trial. *See* Enclosure 58 (filed under seal).

The execution of OPLAN BRAVO was given a time frame of 30 days; from the time the order was given to the actual day of the hearing, to account for all the logistical coordination needed to execute the plan. Some of the considerations were the placement of the trailers and the set-up accordingly, the installation of network access to the trailers, the transportation of the accused from Fort Leavenworth to Fort Meade, the delivery and set-up of the latrine trailers, the delivery and set-up of the canopies around the entire compound, the creation of user accounts for personnel at Fort Meade's network, the set-up of the media center, etc. The purpose of this time frame was to allow for the proper set-up and execution of all logistical issues dealing with this

court-martial, including execution of Department of the Army contracts with vendors. *See id.* (filed under seal).

F. Excluded Delay (22 April 2011 – 15 December 2011)

1. *22 April 2011 – 25 May 2011*

On 25 April 2011, the prosecution requested SPCMCA#2 delay restarting the Article 32 investigation until the prosecution received consent from all the OCAs involved in this case to release discoverable classified evidence and information to the defense. *See* Enclosure 11. On 26 April 2011, the defense provided a response to SPCMCA#2 which acknowledged the need for the classified information and made three specific requests. *See* Enclosure 1, at 0438. On 29 April 2011, SPCMCA#2 approved the prosecution's request and delayed the Article 32 investigation until the earlier of the completion of the OCA Disclosure Requests and OCA Classification Reviews or 25 May 2011. *See* Enclosures 12 and 28. SPCMCA#2 specifically excluded the period between 22 April 2011 and the restart of the Article 32 Investigation, with a required update by the prosecution within 30-45 days. *See id.*

Again, SPCMCA#2 not only approved the period of excluded delay in writing, but also accounted for the excluded delay in a series of monthly accounting memoranda.

***Accounting* Memorandum, dated 12 May 2011.** On 12 May 2011, SPCMCA#2 memorialized that the period from 22 April 2011 up to and including 12 May 2011 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. OCA consent to disclose classified information.

c. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

e. Government Request for Delay of Article 32 Investigation, dated 25 April 2011. *See* Enclosure 28.

***Accounting* Memorandum, dated 17 June 2011.** On 17 June 2011, SPCMCA#2 memorialized that the period from 12 May 2011 up to and including 17 June 2011 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. OCA consent to disclose classified information.

c. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

e. Government Request for Delay of Article 32 Investigation, dated 22 may 2011.

See Enclosure 28.

2. *25 May 2011 – 25 June 2011*

On 22 May 2011, the prosecution requested SPCMCA#2 delay restarting the Article 32 investigation until the prosecution received proper authority to release discoverable unclassified evidence and information, as well as consent from all the OCAs involved in this case to release discoverable classified evidence and information to the defense, whichever is earlier. *See* Enclosure 11. On 24 May 2011, the defense provided a response which maintained its 26 April 2011 position acknowledging the need for additional discovery and noting the potential for further delay for defense to adequately prepare for the Article 32. *See* Enclosure 1, at 0474. On 26 May 2011, SPCMCA#2 approved the prosecution's request and delayed the Article 32 investigation until the earlier of the completion of the OCA Disclosure Requests and OCA Classification Reviews, and authorization is granted to disclose protected unclassified information, or 25 June 2011. *See* Enclosure 12. SPCMCA#2 specifically excluded the period between 22 April 2011 and the restart of the Article 32 Investigation, with a required update by the prosecution within 30-45 days. *See id.*

Again, SPCMCA#2 not only approved the period of excluded delay in writing, but also accounted for the excluded delay in a series of monthly accounting memoranda. The relevant accounting memoranda, which included the period of excluded delay and the bases for his decision, consisted of the above memorandum dated 17 June 2011, as well as the memorandum dated 13 July 2011.

***Accounting* Memorandum, dated 13 July 2011.** On 13 July 2011, SPCMCA#2 memorialized that the period from 17 June 2011 up to and including 13 July 2011 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. OCA consent to disclose classified information.

c. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

e. Government Request for Delay of Article 32 Investigation, dated 5 July 2011.

See Enclosure 28.

3. *25 June 2011 – 27 July 2011*

On 27 June 2011, the prosecution requested SPCMCA#2 delay restarting the Article 32 investigation until the prosecution received proper authority to release discoverable unclassified evidence and information, as well as consent from all the OCAs involved in this case to release discoverable classified evidence and information to the defense, whichever is earlier. *See* Enclosure 11. On 29 June 2011, the defense provided a response which maintained its 26 April 2011 position acknowledging the need for additional discovery and noting the potential for further delay for defense to adequately prepare for the Article 32. *See* Enclosure 1, at 0531. On 5 July 2011, SPCMCA#2 approved the prosecution's request and delayed the Article 32 investigation until the earlier of the completion of the OCA Disclosure Requests and OCA Classification Reviews, and authorization is granted to disclose protected unclassified information, or 27 July 2011. *See* Enclosure 12. SPCMCA#2 specifically excluded the period between 22 April 2011 and the restart of the Article 32 Investigation, with a required update by the prosecution within 30-45 days. *See id.*

Again, SPCMCA#2 not only approved the period of excluded delay in writing, but also accounted for the excluded delay in a series of monthly accounting memoranda. The relevant accounting memoranda, which included the period of excluded delay and the bases for his decision, consisted of the above memorandum dated 13 July 2011, as well as the memorandum dated 10 August 2011.

***Accounting* Memorandum, dated 10 August 2011.** On 10 August 2011, SPCMCA#2 memorialized that the period from 13 July 2011 up to and including 10 August 2011 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. OCA consent to disclose classified information.

c. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

e. Government Request for Delay of Article 32 Investigation, dated 25 July 2011.

See Enclosure 28.

4. *27 July 2011 – 27 August 2011*

On 22 July 2011, the prosecution requested SPCMCA#2 delay restarting the Article 32 investigation until the prosecution received proper authority to release discoverable unclassified evidence and information, as well as consent from all the OCAs involved in this case to release discoverable classified evidence and information to the defense. *See* Enclosure 11. On 25 July 2011, the defense renewed its request to order the prosecution to provide either a substitute for or a summary of the information for the relevant classified documents; to allow the defense to inspect any and all unclassified documents, tangible items, and reports within the government's control; to provide discovery to the defense either previously denied or not provided; and to provide access to all CID and other law enforcement agents who have worked on this case. *See* Enclosure 1, at 0561. Additionally, the defense renewed its request for speedy trial. *See id.* On 26 July 2011, SPCMCA#2 approved the prosecution's request and delayed the Article 32 investigation until the earlier of the completion of the OCA Disclosure Requests and OCA Classification Reviews, and authorization is granted to disclose protected unclassified information, or 27 August 2011. *See* Enclosure 12. SPCMCA#2 specifically excluded the period between 22 April 2011 and the restart of the Article 32 Investigation, with a required update by the prosecution within 30-45 days. *See id.* SPCMCA#2 also ordered the prosecution to expeditiously disclose material once authority to disclose that material was provided. *See id.*

Again, SPCMCA#2 not only approved the period of excluded delay in writing, but also accounted for the excluded delay in a series of monthly accounting memoranda. The relevant accounting memoranda, which included the period of excluded delay and the bases for his decision, consisted of the above memorandum dated 10 August 2011, as well as the memorandum dated 15 September 2011.

***Accounting* Memorandum, dated 15 September 2011.** On 15 September 2011, SPCMCA#2 memorialized that the period from 10 August 2011 up to and including 15 September 2011 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. OCA consent to disclose classified information.

c. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

e. Government Request for Delay of Article 32 Investigation, dated 25 August 2011.

See Enclosure 28.

5. *27 August 2011 – 27 September 2011*

On 25 August 2011, the prosecution requested SPCMCA#2 delay restarting the Article 32 investigation until the prosecution received proper authority to release discoverable unclassified evidence and information, as well as consent from all the OCAs involved in this case to release discoverable classified evidence and information to the defense. *See* Enclosure 11. On 27 August 2011, the defense maintained its previous position that any additional delay should not be excluded. *See* Enclosure 1, at 0628. On 29 August 2011, SPCMCA#2 approved the prosecution's request and delayed the Article 32 investigation until the earlier of the completion of the OCA Disclosure Requests and OCA Classification Reviews, final determination of derivative classifications, final review of the CID case file by the National Security Agency, and authorization is granted to disclose protected unclassified information, or 27 September 2011. *See* Enclosure 12. SPCMCA#2 specifically excluded the period between 22 April 2011 and the restart of the Article 32 Investigation, with a required update by the prosecution within 30-45 days. *See id.* SPCMCA#2 also ordered the prosecution to expeditiously disclose material once authority to disclose that material was provided. *See id.*

SPCMCA#2 not only approved the period of excluded delay in writing, but also accounted for the excluded delay in a series of monthly accounting memoranda. The relevant accounting memoranda, which included the period of excluded delay and the bases for his decision, consisted of the above memorandum dated 15 September 2011, as well as the memorandum dated 14 October 2011.

***Accounting* Memorandum, dated 14 October 2011.** On 14 October 2011, SPCMCA#2 memorialized that the period from 15 September 2011 up to and including 14 October 2011 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. OCA consent to disclose classified information.

c. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

d. Defense Request for Appropriate Security Clearances for the Defense Team and Access for PFC Manning, dated 3 September 2010.

e. Government Request for Delay of Article 32 Investigation, dated 26 September 2011.

See Enclosure 28.

6. *27 September 2011 – 27 October 2011*

On 26 September 2011, the prosecution requested SPCMCA#2 delay restarting the Article 32 investigation until the completion of OCA Disclosure Requests, OCA Classification Reviews, a final determination of derivative classifications, receipt of signed protective orders from the defense, and properly portion-marked classified documents by the OGA#2, or 27 October 2011. *See* Enclosure 11. On 27 September 2011, the defense maintained its previous position that any additional delay should not be excluded. *See* Enclosure 1, at 0661. On 28 September 2011, SPCMCA#2 approved the prosecution's request and delayed the Article 32 investigation until the earlier of the completion of the OCA Disclosure Requests, OCA Classification Reviews, a final determination of derivative classifications, receipt of signed protective orders from the defense, and properly portion-marked classified documents by the NSA, or 27 October 2011. *See* Enclosure 12. SPCMCA#2 specifically excluded the period between 22 April 2011 and the restart of the Article 32 Investigation, with a required update by the prosecution within 30-45 days. *See id.* SPCMCA#2 also ordered the prosecution to expeditiously disclose material once authority to disclose that material was provided.

SPCMCA#2 not only approved the period of excluded delay in writing, but also accounted for the excluded delay in a series of monthly accounting memoranda. The relevant accounting memoranda, which included the period of excluded delay and the bases for his decision, consisted of the above memorandum dated 14 October 2011, as well as the memorandum dated 16 November 2011.

***Accounting* Memorandum, dated 16 November 2011.** On 16 November 2011, SPCMCA#2 memorialized that the period from 14 October 2011 up to and including 16 November 2011 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. OCA consent to disclose classified information.

c. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

d. Government Request for Delay of Article 32 Investigation, dated 27 October 2011.

See Enclosure 28.

7. *27 October 2011 – 28 November 2011*

On 25 October 2011, the prosecution requested SPCMCA#2 delay restarting the Article 32 investigation until the completion of OCA Disclosure Requests, OCA Classification Reviews, and receipt of signed protective orders from the defense, or 28 November 2011. *See* Enclosure 11. On 25 October 2011, the defense maintained its previous position that any additional delay should not be excluded. *See* Enclosure 1, at 0696. On 27 October 2011, SPCMCA#2 approved the prosecution's request and delayed the Article 32 investigation until the earlier of the completion of the OCA Disclosure Requests, OCA Classification Reviews, and receipt of signed protective orders from the defense, or 28 November 2011. *See* Enclosure 12. SPCMCA#2 specifically excluded the period between 22 April 2011 and the restart of the Article 32 Investigation, with a required update by the prosecution within 30-45 days. *See id.* SPCMCA#2 also ordered the prosecution to expeditiously disclose material once authority to disclose that material was provided. *See id.*

SPCMCA#2 not only approved the period of excluded delay in writing, but also accounted for the excluded delay in a series of monthly accounting memoranda. The relevant accounting memoranda, which included the period of excluded delay and the bases for his decision, consisted of the above memorandum dated 16 November 2011, as well as the memorandum dated 3 January 2012.

***Accounting* Memorandum, dated 3 January 2012.** On 3 January 2012, SPCMCA#2 memorialized that the period from 16 November 2011 up to and including 15 December 2011 was excludable delay under RCM 707(c). SPCMCA#2 memorialized that his decision was reasonable based on the following extensions, defense requests, responses, and the facts and circumstances of this case:

a. Original Classification Authorities' (OCA) reviews of Classified Information.

b. OCA consent to disclose classified information.

c. Defense Request for Results of the Government's Classification Reviews by OCAs, dated 26 August 2010.

d. Government Request for Delay of Article 32 Investigation, dated 10 November 2011.

See Enclosure 28.

8. *16 November 2011 – 15 December 2011*

On 16 October 2011, the prosecution requested SPCMCA#2 exclude the period between 16 November 2011 and 16 December 2011 for the prosecution to obtain the final classification review from an OCA and to provide the command adequate time to execute OPLAN BRAVO to account for all the logistical coordination needed to execute the plan. *See* Enclosure 11. On 16 November 2011, the defense objected to the prosecution's proposed start date and proposed the Article 32 investigation start on 12 December 2011. Additionally, the defense maintained its

previous position that any additional delay should not be excluded. *See* Enclosure 1, at 0721. On 16 November 2011, SPCMCA#2 approved the prosecution's request and ordered the Article 32 investigation to restart no earlier than 16 December 2011. *See* Enclosure 12. SPCMCA#2 specifically excluded the period between 22 April and 16 December 2011 under RCM 707(c). *See id.*

SPCMCA#2 not only approved the period of excluded delay in writing, but also accounted for the excluded delay in a series of monthly accounting memoranda. *See* Enclosure 28. The relevant accounting memorandum, which included the period of excluded delay and the bases for his decision, was the above memorandum dated 3 January 2012. *See id.*

G. Article 32 Investigation

The Article 32 investigation took place from 16 December 2011 until 22 December 2011. *See* Enclosure 59. The Article 32 investigation report was completed on 11 January 2012. *See id.*

H. Excluded Delay (24 December 2011 – 2 January 2012; 7 January 2012 – 8 January 2012)

On 4 January 2012, LTC Almanza "exclude[d] as a reasonable delay the days between 23 December 2011 and 3 January 2012 when [he] did not work on the Article 32 Investigation." *See* Enclosure 1, at 0818. On 11 January 2012, the Article 32 Investigating Officer clarified as follows:

> Between 24 December 2011 and 2 January 2012, I did not work on this investigation. Of these ten days, six (24-26 December 2011 and 31 December 2011 – 2 January 2012) were federal holidays or weekend days. I worked on the investigation on 3-6 January 2012 and again from 9-11 January 2012, but not on 7-8 January 2012, which were weekend days. The period between 24 December 2011 and 2 January 2012 and between 7-8 January 2012 is excludable delay.

Enclosure 60. LTC Almanza is a Judge Advocate in the United States Army Reserve Command whose military orders detailing him as the Article 32 Investigating Officer expired on 23 December 2012. LTC Almanza's civilian employer requested that he work in his civilian capacity between 24 December 2011 and 3 January 2012. Since LTC Almanza was unable to work on the investigation, LTC Almanza excluded this period of delay. *See* proffered testimony of LTC Almanza.

LTC Almanza completed his investigation and report before the suspense ordered by SPCMCA#2. *See* Enclosure 61 (requiring LTC Almanza to complete the report by 16 January 2012).

VI: REFERRAL (3 February 2012)

A. Arraignment

1. *Referral*

On 3 February 2012, the charges were referred to a general court-martial. *See* Charge Sheet.

2. *Excludable Delay*

On 3 February 2012, the Court was in receipt of the referred charges against the accused. On 23 February 2012, the accused was arraigned. During an RCM 802 conference on 8 February 2012, the Court excluded the delay from receipt of the referred charge sheet until arraignment.

3. *Arraignment*

On 23 February 2012, the accused was arraigned.

B. Investigation

The current state of the joint investigation is as follows: (1) CID is the lead investigative agency for matters directly involving the accused; (2) FBI's involvement is not focused on the accused; and (3) DSS has ceased its investigative activity relating to this case. The prosecution disclosed, or began to disclose, the below files to the defense on the following dates: (1) the CID file-Iraq: 4 July 2010, CONUS: 25 July 2011; (2) FBI investigative file relating to the accused: 16 March 2012; and (3) DSS investigative file relating to the accused. *See* Enclosure 18.

C. Discovery

Referral triggered the disclosure of a significant amount of classified discovery because some of the equity holders of that information would not approve disclosure of the classified information to the defense absent a military judge to regulate discovery (e.g., limited disclosure under MRE 505(g)(2)), a Protective Order, or both. *See* Enclosure 18 (on 16 March 2012, the same day that the Court entered the Protective Order Governing Classified Information, the prosecution disclosed to the defense the FBI investigative files relating to the accused); *see also* AE CXXXII and CXXXIII (MRE 505(g)(2) filings).

1. *Preservation and Prudential Search Requests*

Overall, the prosecution submitted preservation requests to the following government organizations, agencies, departments, and military commands: DOD, OGA#1, CYBERCOM,[6]

[6] On 27 June 2012, the defense requested that the prosecution review CYBERCOM records for information material to the preparation of the defense. *See* Enclosure 1, at 1273. The prosecution immediately, on 3 July 2012,

DEA, OGA#2, ODNI, ONCIX, FBI, DOS, DOJ,[7] DIA, DISA, DHS, Quantico, CID, ARCENT, and the Command to which the accused was assigned. *See* Enclosures 53. Because of these efforts, the prosecution worked proactively to have organizations preserve material, which later became the subject to both Motion to Compel Discovery #1 and Motion to Compel Discovery #2.

On 16 February 2012, the defense filed its Motion to Compel Discovery #1, requesting, *inter alia*, an Encase forensic image of each computer from the Tactical Sensitive Compartmented Information Facility and the Tactical Operations Center of the Command to which the accused was assigned. *See* AE VIII. Because of CID's preservation request, dated 30 September 2010, all relevant hard drives to which the accused may have had access, all forensic evidence obtained during the investigation, and any TPE hard drives that could be identified as being in the TOC or SCIF were preserved. *See* Enclosure 52; Enclosure 4 to AE XLIX.[8] On 16 April 2012, the prosecution notified the defense that the accused's brigade was able to identify 14 hard drives and, after consultation with its forensic experts, determined that "2 drives were completely inoperable, 7 drives were wiped, 4 drives have file structures present, and 1 drive is partially wiped." *See* Enclosure 1, at 1115.

On 10 May 2012, the defense filed its Motion to Compel Discovery #2, requesting, *inter alia*, all records from the DOS. *See* AE ICVI. On 4 June 2012, the Court ordered the prosecution to produce DOS witnesses who could inform the defense what records exist to facilitate a proper request. *See* AE CXXII. The prosecution secured three DOS witnesses who informed the defense of specific DOS records. Based on that testimony, on 7 June 2012, the defense formulated a discovery request for multiple DOS records. *See* AE CXXXV. Because the prosecution's Prudential Search Request was sufficiently broad that it included such records, the prosecution requested only thirty days to locate, search, and report its findings to the Court. The Court granted that request. *See* AE CILII.

2. *Headquarters, Department of the Army*

In addition to multiple requests by the prosecution described above, the Deputy Staff Judge Advocate (DSJA), MDW emailed OTJAG on 6 March 2012 for an update on the status of the Prudential Search Request. *See* Enclosure 1, at 0940. On 16 March 2012, the DSJA emailed OTJAG again for an update and it was determined that OTJAG was coordinating the best method to efficiently execute the task, which had not occurred based on the OGC, DOD tasker. On 27 March 2012, on behalf of the prosecution, the DSJA, MDW emailed OTJAG with an explanation of the prosecution's discovery obligations, including the requirement to respond to

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submitted a Prudential Search Request to CYBERCOM. *See* Enclosure 73. The prosecution immediately reviewed material responsive to the request and began producing said material. *See* Enclosure 18.

[7] The prosecution reviewed and disclosed DOJ grand jury information responsive to the prosecution's Prudential Search Request. *See* Enclosure 18.

[8] More than one year after the accused's unit redeployed, on 21 September 2011, the defense submitted a similar preservation request. Had it not been for the prosecution's proactive foresight, the hard drives that the prosecution disclosed to the defense might have been wiped.

the Court by 18 May 2012 with an update of the prosecution's review of the DOD and HQDA information. *See* Enclosure 1, at 0993. On 23 April 2012, OTJAG notified the prosecution that it had started to receive responsive information. *See* Enclosure 1, at 1141. On 11 May 2012, the prosecution received the HQDA information. *See* Enclosure 1, at 1185.

From 30 June 2012 to 1 July 2012, the prosecution completed its review of records responsive to the Prudential Search Request, specifically those records originating from HQDA, the Joint Staff, and the Army G-2 office. *See* Enclosure 1, at 1277. The prosecution disclosed all discoverable material to the defense, with the exception of material that required special handling instructions or additional coordination. *See* Enclosure 18; Appellate Exhibit CCXXX.

3. *Discovery Absent a Request*

During its review of the records responsive to various Prudential Search Requests, the prosecution learned that an additional fifty government organizations *may* have prepared a damage assessment to capture what, if any, damage resulted from the unauthorized disclosure of classified information. For those fifty organizations, the prosecution dedicated a single paralegal to reach out to each federal organization and obtain contact information through cold-calls and appearances at their headquarters. *See* Enclosure 57. After approximately a month, the paralegal was able to obtain a majority of the documents for the prosecution's review. For the remaining organizations, a trial counsel retrieved contact information, requested authority to review each organization's responses, and retrieved said response (if any). *See* e.g., Enclosure 1, at 1118. Afterwards, the prosecution reviewed said responses, requested authority to disclose any discoverable response to the defense, and discussed with each organization's Office of the General Counsel what, if any, information within the response was discoverable and the consequences of providing that material to the defense, to include an explanation of the military rules of discovery, MRE 505, and the accused's access to that information. The prosecution often engaged in multiple phone calls or email correspondence with the agency representatives to discuss these issues. *See, e.g.*, *id.* Since 3 August 2012, the prosecution has disclosed all discoverable material identified from those organizations as a result of these efforts.

Additionally, on 25 July 2012, and in preparation for the upcoming Article 13 motions hearing, the prosecution began reviewing emails from Quantico that were responsive to the prosecution's Preservation Request dated 28 April 2011. *See* AE CCXLIV.

On 8 December 2010, the Defense submitted a discovery request, requesting "[a]ny and all documents or observation notes by employees of the Quantico confinement facility relating to [the accused]." Enclosure 68. In the same discovery request, the Defense requested "[a]ny report, *e-mail* or document discussing the need for the State Department to disconnect access to its files from the government's classified network." *Id.* (emphasis added). The discovery request also requested, "[a]ny e-mail, report, assessment, directive, or discussion by President Obama to the Department of Defense, Department of State or Department of Justice." *Id.* (emphasis added). The discovery request further requested, "any and all memorandums, *e-mails*, or other references by Congressmen, Senators, or government officials concerning the disposition of this case or the need to punish [the accused]." *Id.* (emphasis added). The discovery request requested, "[a]ny and all documentation, *e-mails*, or reports given to the Summary Court-Martial

Convening Authority, the General Court-Martial Convening Authority, or the Staff Judge Advocate concerning the disposition of [the accused's] case or nature of the charges or possible charges against [the accused]." *Id.* (emphasis added).

On 1 August 2012, the Defense filed a discovery request, requesting. "[a]ll documentation provided . . . in response to the Government's [prudential search request]," and "any other e-mails or documentation that the Government is aware of . . . dealing with [the accused's] confinement conditions while at Quantico." *See* Enclosure 2 to AE CCXLIV.

On 28 August 2012, the prosecution produced the emails of the parties' witnesses and emails material to the preparation of the defense. *See* Enclosure 18. Thereafter, the Court ordered the majority of the remaining emails be produced to the defense, and the prosecution produced those emails.

4. *3 August 2012 and 14 September 2012*

On 22 June 2012, 19 July 2012, and 1 August 2012 and pursuant to extensive discovery litigation concerning classified information, the Court ordered the prosecution, *inter alia*, to disclose to the defense, or submit to the Court for limited disclosure under MRE 505(g)(2), all discoverable material from all military authorities (e.g., DIA, DOD), the FBI, any evidence the prosecution intends to use on the merits and during sentencing, DOS, DHS, and ODNI. *See* AE CXLVII; AE CCXXII; AE CCXXX.

By 28 June 2012, DOS completed gathering all information responsive to the prosecution's original Prudential Search Request. The prosecution promptly reviewed the information over several full days and, by 19 July 2012, had completed its review. Afterwards, the prosecution met with DOS on multiple occasions to discuss its review, discovery in the military justice system, and the Court's Order relating to discovery due on 14 September 2012. *See* Enclosure 1, at 1368. On 14 September 2012, the prosecution disclosed to the defense approximately 4,500 classified DOS documents. *See* Enclosure 18. The prosecution also filed a motion for limited disclosure under MRE 505(g)(2) for the remaining DOS documents.

5. *Approval to Disclose Classified Information*

i. Army G-2. By 17 August 2012, the prosecution received approval to disclose all known discoverable DOD information, and produce the information.

ii. DIA. By 17 August, the prosecution received approval to disclose all known discoverable information and/or filed a motion for limited disclosure of DIA records under MRE 505(g)(2), and disclosed the mater. *See* AE CCLXVIII.

iii. DOS. On 14 September 2012, the prosecution disclosed, or submitted for limited disclosure under MRE 505(g)(2), all known discoverable DOS information subject to the Court's Order. *See* AE CCCI. On 28 September 2012, the Court granted the prosecution's motion, in part. *See* AE CCCII. On 2 October 2012, the Court held an *ex parte* session with the prosecution.

iv. OGA#1. On 3 August 2012, the prosecution made all discoverable OGA#1 records available to the defense for inspection, and/or filed a MRE 505(g)(2) motion.

v. NCIX. On 3 August 2012, he prosecution made all discoverable NCIX records available to the defense for inspection, and/or filed a MRE 505(g)(2) motion. *See* AE CCLXVII.

vi. ODNI. On 14 September 2012, the prosecution made all known discoverable ODNI records available to the defense for inspection.

vii. FBI. On 3 August 2012, the prosecution made all discoverable FBI records available to the defense for inspection, and/or filed a MRE 505(g)(2) motion. *See* AE CCLXVI. On 14 September 2012, the prosecution filed a supplement to its MRE 505(g)(2) motion.

6. *Discovery Overview*

In sum, a total of seven OCAs maintain equities in charged documents or digital forensic evidence. A classification review from each of the seven OCAs was necessary to move this case forward; not only to ensure a thorough Article 32 investigation, but also to safeguard the information at hand. Three law enforcement agencies have engaged in investigative activities at various times in this case. The prosecution initially had a good faith basis to believe there was discoverable information in the records of thirteen government organizations; however, that number grew to more than sixty organizations during the prosecution's search for discoverable information. Further, much of that discovery was classified, requiring interagency coordination between dozens of organizations. To date, the prosecution has disclosed a total of 62,172 documents, consisting of 523,672 pages, of which 57,604 documents, consisting of 435,208 pages, are classified—all of which required, *inter alia*, the approval from each respective OCA.

Subject to the Court's ruling with respect to the FBI records and *Gilgio*/Jencks disclosures scheduled for 15 October 2012, the prosecution has disclosed, or is applying the approved redactions under MRE 505(g)(2) or RCM 701(g) to disclose, all discoverable material to the defense.

D. Motions Practice

The Court has held Article 39(a), UCMJ, sessions to address motions filed by the parties on the following dates: (1) 15-16 March 2012; (2) 24-26 April 2012; (3) 6-8 June 2012; (4) 16-20 July 2012; and (5) 27-30 August 2012. *See* Case Calendar. To date, there are more than three hundred appellate exhibits. *See* Appellate Exhibit List. As of this response, the parties have filed motions yet to be litigated, including two defense motions totaling a combined two hundred and thirty pages in which the defense requested the prosecution produce more than one hundred witnesses. *See* Defense Motion for Violation of Speedy Trial; Defense Motion for Violation of Article 13, UCMJ.

LAW AND ARGUMENT

There are a number of sources of the right to a speedy trial in the military: (1) statute of limitations; (2) Due Process Clause of the Fifth Amendment; (3) Sixth Amendment speedy-trial guarantee; (4) Articles 10 and 33 of the Code, 10 USC §§ 810 and 833, respectively; (5) RCM 707; and (6) case law. *See United States v. Reed*, 41 M.J. 449, 451 (C.A.A.F. 1995); *United States v. Parish*, 1968 WL 5370 (C.M.A. 1968) (right to a speedy trial is a "fundamental right" and "[u]nquestionably…a substantial right"); *United States v. Prater*, 1971 WL 12753 (C.M.A. 1971) (courts associated the concept with "military due process"). The defense argues a lack of speedy trial under RCM 707, Article 10, UCMJ (hereinafter "Article 10"), and the Sixth Amendment of the United States Constitution. For the reasons that follow, the United States has not violated the accused's right to a speedy trial under either source.[9]

RCM 707

An accused's right to a speedy trial stems, in part, from RCM 707. *See United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003); *Reed*, 41 M.J. at 451. RCM 707 provides, *inter alia*, that the accused shall be brought to trial within 120 days of preferral of charges, restraint in lieu of arrest, arrest, pretrial confinement (PTC), or entry onto active duty under R.C.M. 204, whichever comes first. *See* RCM 707(a); *see also* RCM 707, discussion ("delay from time of an offense to preferral of charges or the imposition of pretrial confinement is not considered for speedy trial purposes"). The date of preferral of charges, pretrial restraint, or entry on active duty "shall not count for purpose of computing time under [RCM 707]." RCM 707(b)(1). An accused is "brought to trial" within the meaning of RCM 707 at arraignment. *Id.* (noting that speedy trial clock expires at, and includes the date of, arraignment); *United States v. Hatley*, 2011 WL 2782023 (A.C.C.A. 2011). The purpose of the 120-day time limit is to protect speedy trial rights under the Sixth Amendment and Article 10, and society's interest in the prompt administration of justice. *See* RCM 707, analysis.

On 27 May 2010, the accused was placed under restraint. On 23 February 2012, the accused was arraigned. <u>The accused was brought to trial under RCM 707 a total of 637 days after his arrest.</u>

I: Summary of RCM 707 Speedy Trial Clock

The prosecution provides the following table, as well as the enclosed calendar, to assist the Court in determining which periods of time the parties stipulate count toward the speedy trial clock under RCM 707, which periods of time the parties stipulate were properly excluded and do not count toward the speedy trial clock under RCM 707, and which periods of time the parties contest. *See* Enclosure 62.

Date	Event	Speedy Trial Clock
27 May 2010	Accused under restraint	0

[9] Consistent with relevant case law and to avoid redundancies, the prosecution will first address RCM 707 and then consolidate Article 10 and Sixth Amendment.

12 July 2010	Defense requests SPCMCA#1 delay the Article 32 investigation until RCM 706 completed	45
12 July 2010	Excludable delay granted by SPCMCA#1	45
3 August 2010	RCM 706 sanity board ordered	45
11 August 2010	Defense requests SPCMCA#2 delay the Article 32 investigation until RCM 706 completed	45
12 August 2010	Excludable delay granted by SPCMCA#2	45
22 April 2011	RCM 706 completed	45
29 April 2011	Excludable delay granted by SPCMCA#2	45
26 May 2011	Excludable delay granted by SPCMCA#2	45
5 July 2011	Excludable delay granted by SPCMCA#2	45
26 July 2011	Excludable delay granted by SPCMCA#2	45
29 August 2011	Excludable delay granted by SPCMCA#2	45
28 September 2011	Excludable delay granted by SPCMCA#2	45
27 October 2011	Excludable delay granted by SPCMCA#2	45
16 November 2011	Excludable delay granted by SPCMCA#2	45
16 December 2011	Article 32 Investigation commenced	45
22 December 2011	Article 32 Investigation completed	52
24 December 2011	Excludable delay granted by Article 32 IO	53
2 January 2012	Excludable delay granted by Article 32 IO expired	53
7 January 2012	Excludable delay granted by Article 32 IO	57
8 January 2012	Excludable delay granted by Article 32 IO expired	57
3 February 2012	Referral	83
3 February 2012	Referred charge sheet provided to Court	83
8 February 2012	Court excluded time from referral to arraignment	83
23 February 2012	Arraignment	84

II: The SPCMCAs Properly Excluded All Contested Periods of Delay

Prior to referral, a convening authority may exclude periods of time towards the speedy trial clock or delegate that authority to the Article 32 IO. *See* RCM 707(c)(1); RCM 707(c), discussion; *United States v. Lazauskas*, 62 M.J. 39, 41 (C.A.A.F. 2005) (RCM 707 focuses on whether a period of time is excludable because a delay has been granted, not on which party is responsible for the delay). After referral, a military judge may grant a requested delay. *See id*. Advance approval by the particular authority may be desirable in terms of implementing the goal of eliminating after-the-fact determinations. However, convening authorities may approve a delay after-the-fact where the delay is "granted at the specific request of the defense and for the direct benefit of the defense." *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997).

Decisions granting or denying pretrial delays are within the sole discretion of the convening authority or military judge and will be subject to review for abuse of discretion. *See Lazauskas*, 62 M.J. at 41 (stating that under R.C.M. 707(c), all pretrial delays approved by the convening authority are excludable so long as approving them was not an abuse of the convening authority's discretion). RCM 707(c) requires that the proper authority "make an independent determination as to whether there is in fact good cause for a pretrial delay, and to grant such delays for only so long as is necessary under the circumstances." *Thompson*, 46 M.J. at 475 (citing Drafters' Analysis of RCM 707(c), MCM, at A21-41); *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993) (explaining that in determining whether the time attributed to the delay was necessary under the circumstances, the standard is whether the time taken was reasonable). The decision excluding delay should be based on the facts and circumstances at hand. *See* RCM 707(c), discussion. When practicable, "the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing." RCM 707, discussion.

A. Good Cause for the Requested Delay

Reasons to grant a delay might include, *inter alia*, the following: (1) time to enable counsel to prepare for trial in complex cases; (2) time to allow examination into the mental capacity of the accused; (3) time to complete other proceedings related to the case; (4) time requested by the defense; (5) time to secure the availability of the accused, substantial witnesses, or other evidence; (6) time to obtain appropriate security clearances for access to classified information; or (7) additional time for other good cause. *See* RCM 707(c), discussion.

The SPCMCAs provided specific reasons supporting all periods of excluded delay. The grounds upon which the SPCMCAs relied were consistent with those enumerated in the discussion of RCM 707(c) and supported by case law, namely time to allow examination into the mental capacity of the accused, time to prepare for a complex trial, time to secure evidence, time to obtain appropriate security clearances for access to classified information, and additional time for other good cause. *See* RCM 707, discussion; *see e.g.*, Enclosures 12 and 28.

The SPCMCAs cited the following bases for excluding the periods of delay: (1) defense's request for a sanity board; (2) defense's request for a delay in the sanity board to comply with prohibitions on disclosure of classified information; (3) OCA reviews of classified information; (4) defense's request for results of the classification reviews by the OCAs; (5) defense's request for appointment of expert with expertise in forensic psychiatry; (6) defense's request for appropriate security clearances for the defense team and access for the accused; (7) PCR of the accused's mental impressions; (8) defense's response to the PCR; (9) defense's request to resolve issues relating to civilian defense counsel and defense expert witnesses; and (10) OCA consent to disclose classified information to the defense. *See* Enclosures 12 and 28.

B. Reasonable Time for Delay

RCM 707(c) authorizes the convening authority "to grant such delays for only so long as is necessary under the circumstances." *Thompson*, 46 M.J. at 475; *Kossman*, 38 M.J. at 262. Put another way, "the standard is not whether it could have been done sooner, but whether the time it

did take was reasonable." *United States v. Mahoney*, 28 M.J. 865 (A.F.Ct.Crim.App. 1989). Exclusions of delay are proper for an "interval of time between events, not a blanket exclusion of time from one point in time until a date specific (and not an event specific)." *United States v. Rowe*, 2003 WL 828986 (A.F.C.C.A. 2003); *United States v. Proctor*, 58 M.J. 792 (A.F.Ct.Crim.App. 2003); *United States v. Nichols*, 42 M.J. 715, 721 (A.F.Ct.Crim.App. 1995) (defining a "delay" under R.C.M. 707 as "any interval of time between events").

The SPCMCAs not only detailed, in writing, the bases upon which they relied in excluding the periods of delay for speedy trial purposes, but also excluded periods of delay for only so long as was necessary under the circumstances.

Both SPCMCAs memorialized the bases for their respective approvals of excluded delay at least once per month. In addition, memoranda were regularly produced, accounting for excludable delay and describing the bases for those decisions. *See* Enclosures 12 and 28. The Excludable Delay and Accounting of Excludable Delay memoranda were provided to the defense, and the SPCMCAs considered any defense objections thereto. *See* Enclosures 12 and 28.

III: Contested Periods of Excluded Delay

In sum, the SPCMCAs considered the defense requests to delay the Article 32 investigation until completion of a sanity board. Further, SPCMCA#2 considered eight requests by the prosecution to delay the Article 32 investigation, and to exclude those periods of delay from the speedy trial clock, until the prosecution received approval to disclose classified and unclassified information to the defense. *See* Enclosure 28. Before making a decision, SPCMCA#2 requested the defense's position regarding the requested period of delay. *See* Enclosure 1, at 0435, 0473, 0528; *see also* RCM 707(c), discussion ("[p]retrial delays should not be granted *ex parte*"). SPCMCA#2 considered any defense objection to the period of delay. *See* Enclosures 12 and 28.

SPCMCA#2 considered two requests by the sanity board for an extension of time to complete the evaluation reports, so that the evaluators could coordinate the final evaluation session given the number of parties involved and the necessary security procedures. Further, SPCMCA#2 generally accounted for any excludable delay two weeks after excluding a period of delay. *See* Enclosure 28. Thus, beginning at the completion of the sanity board on 22 April 2011, SPCMCA#2 excluded, or accounted for his decision to exclude, periods of delay approximately every other week.

The defense argues, and the prosecution contests, the following: (1) that the SPCMCAs abused their discretion in excluding the period of delay from 12 July 2010 until 10 August 2010 and 4 March 2011 until 15 December 2011; (2) that the IO abused his discretion in excluding the period of delay from 24 December 2011 until 2 January 2012 and 7 January 2012 until 8 January 2012; and (3) that the period of delay from 3 February 2012 until 22 February 2012 should count towards the RCM 707 speedy trial clock. *See* Defense Motion.

A. <u>Period #1 (12 July 2010 – 10 August 2010) (30 days)</u>

On 12 July 2010, SPCMCA#1 approved the defense's request for a delay of the Article 32 investigation until 16 August 2010 for completion of a sanity board and to resolve issues with civilian counsel. *See* Enclosure 12. SPCMCA#1 excluded the period of delay from 12 July 2010 until 16 August 2010. SPCMCA#1's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#1 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See Thompson*, 46 M.J. at 475. Time necessary to complete an examination into the accused's mental capacity is a proper ground for an excludable delay. *See* RCM 707(c), discussion. If the reason for the delay is an enumerated exclusion, the prosecution shall be relieved from accountability, subject to the reasonableness of the delay. *See United States v. Longhofer*, 29 M.J. 22, 27 (C.M.A. 1989) (discussing RCM 707, Manual for Courts-Martial, United States, 1984).

On 28 July 2010, the jurisdiction for this court-martial transferred to MDW. *See* Enclosure 13. On 2 August 2010, the GCMCA released the charges preferred against the accused to SPCMCA#2. *See* Enclosure 16. On 3 August 2010, SPCMCA#2 ordered a sanity board "based on the information contained in the defense request for sanity board, dated 11 July 2010, and the defense renewed request for sanity board, dated 18 July 2010." Enclosure 34. On 11 August 2010, the defense requested a delay of the Article 32 investigation until completion of a sanity board. *See* Enclosure 11. On 12 August 2010, SPCMCA#2 approved the defense's request for a delay of the Article 32 investigation until completion of the sanity board. *See* Enclosure 12. SPCMCA#2 excluded the period from 11 August 2010 until completion of the sanity board. *See id*. SPCMCA#2's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#2 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See Thompson*, 46 M.J. at 475; *see also* RCM 707(c), discussion; *Longhofer*, 29 M.J. at 27.

On 12 October 2010, SPCMCA#2 accounted for periods of excludable delay. *See* Enclosure 28. SPCMCA#2 stated that the period of excludable delay spanned from 12 July 2010 until the date of that memorandum, 12 October 2010. *See id*. The basis for the delay included, *inter alia*, the defense's request for a sanity board, which SPCMCA#2 subsequently ordered on 3 August 2010 after jurisdiction transferred to MDW. *See id*; *see also* Enclosure 34. The CAAF in *Thompson* held that convening authorities may approve a delay after-the-fact where the delay is "granted at the specific request of the defense and for the direct benefit of the defense." *Thompson*, 46 M.J. at 475. Here, SPCMCA#2 made an after-the-fact exclusion based upon a specific defense request for the direct benefit of the defense (i.e., completion of the sanity board). Therefore, even assuming SPCMCA#1's exclusion of delay expired at the date jurisdiction transferred to MDW, SPCMCA#2's exclusion of delay from 12 July 2010 was proper.[10] SPCMCA#2's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#2 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See Thompson*, 46 M.J. 475; *see also* RCM 707(c), discussion; *Longhofer*, 29 M.J. at 27.

[10] The prosecution could not find any case law to support or rebut that the exclusion expires when the case transfers jurisdiction.

In sum, SPCMCA#2, or at a minimum both SPCMCAs, properly excluded the period of delay from 12 July 2010 until 10 August 2010. The defense argues SPCMCA#2 abused his discretion by excluding this period of delay on two grounds: first, that the prosecution "made no apparent progress" on the defense's original request for a sanity board; and second, that SPCMCA#2 failed to state the reasons that justified excluding the delay.

1. Government Activity

The defense's first argument is without factual merit. *Before the defense submitted its request for a sanity board*, the prosecution took steps to locate both a provider and proper facility to conduct the sanity board. *See* Enclosure 33. On 1 July 2010, the trial counsel in Iraq contacted medical personnel at Europe Regional Medical Command and Landstuhl Regional Medical Center to begin coordination for the sanity board and to identify a provider. On 11 July 2010 and 12 July 2010, the trial counsel requested assistance in locating a provider to conduct the sanity board from the USD-C Division Psychiatrist, the USF-I Deputy Surgeon, the USF-I Deputy Surgeon, and the USF-I Surgeon. All of the above could not provide assistance. *See id*.

On 13 July 2010, the ARCENT SJA recommended that the accused be transferred to an appropriate facility as soon as possible, even without a sanity board in place, because the Commanding General, USD-C/1AD, had ordered that the accused be transferred from the TFCF due to its lack of resources to provide the specialized mental care necessary for the accused. From that time forward, the trial counsel worked towards accomplishing that mission until Army Corrections Command transferred the accused to Quantico on 29 July 2010.

From 29 July 2010 until 2 August 2010, the accused in-processed at Quantico and received an initial psychiatric evaluation. *See* Enclosures 14 and 15; *see also* Government Response to Defense Article 13 Motion.

On 2 August 2010, the GCMCA released the charges to SPCMCA#2. *See* Enclosure 13.

On 3 August 2010, after the case was transferred to MDW and with the prosecution's assistance, SPCMCA#2 ordered a sanity board. *See* Enclosure 34. On 5 August 2010 and 9 August 2010, the prosecution coordinated with the defense regarding the sanity board. *See* Enclosure 1, at 0016 (the defense notified the sanity board and prosecution that the accused would not need to divulge classified information during the evaluation); *see also* Enclosure 1, at 0019.

The defense's first argument that the prosecution "did nothing" between the above dates could not be further from the truth.

2. Reasons for Exclusion

The defense's second argument ignores the clear language of SPCMCA#1's excludable delay memorandum dated 12 July 2010 and is inconsistent with SPCMCA#2's accounting of the excludable delay dated 12 October 2010. *See* Enclosures 12 and 28. On 12 July 2010, SPCMCA#1 explicitly notified the parties of the reasons supporting his decision, namely the

defense's request for a sanity board and the issues relating to civilian defense counsel and defense expert witnesses. *See* Enclosure 12. The defense ignores SPCMCA#1's exclusion. Instead, the defense argues SPCMCA#2 provided "no actual reason" justifying the delay. To the contrary, SPCMCA#2 notified the parties that his decision was based on the defense's request for a delay. *See* Enclosure 28. The defense argues the decision granting the delay must include justification to the defense's satisfaction, which is both more than that which the rule requires and a standard too nebulous to meet. *See* RCM 707(c), discussion.

B. Period #2 (4 March 2011 – 18 March 2011) (15 days)

On 18 March 2011, SPCMCA#2 approved the sanity board's request for an extension of time to complete its report. *See* Enclosure 12. That same day, SPCMCA#2 accounted for all excludable delay and listed the sanity board's request as one of the six bases for his decision. *See* Enclosure 28 (SPCMCA#2 relied upon additional reasons to support his decision to exclude this period of delay (e.g., classification reviews, OCA approvals to disclose discovery to the defense), all of which are permissible reasons under RCM 707(c)).

SPCMCA#2's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#2 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See supra*; *see also Thompson*, 46 M.J. at 475; RCM 707(c), discussion; *McCullough*, 60 M.J. at 580; *Longhofer*, 29 M.J. at 27. The defense argues SPCMCA#2 abused his discretion by excluding this period of delay on two grounds: first, the sanity board's reasons for an extension to complete its report were inadequate; and second, SPCMCA#2 failed to state the reasons that justified excluding the delay.

1. Request for Extension

The accused's pretrial confinement status at Quantico, coupled with the media attention arising from the WikiLeaks releases, caused safety concerns with transporting the accused from Quantico to the SCIF. It was determined that transporting the accused on a weekend would reduce both any transportation concerns (e.g., traffic) and any media attention that may jeopardize the accused's safety. *See* Enclosure 1, at 0320. Therefore, scheduling the board to interview the accused – in a SCIF, over a weekend, after the above medical procedures had been undertaken, and with all participants present – became a more timely process.

On 14 March 2011, the sanity board requested an extension largely because it had not been able to interview the accused by 3 March 2011 given the complexities of conducting the interview. *See* Enclosure 30 (documenting that the sanity board notified SPCMCA#2 that it anticipated the interview of the accused to take place by 10 April 2011); *see also* Enclosure 29 (ordering the interview to take place in a SCIF, over a weekend, with all *defense-requested* participants present). SPCMCA#2 also ordered that the accused receive an MRI and CAT scan as part of the evaluation. *See* Enclosures 1, at 0354 and 0370, and 29. For those reasons, the sanity board could not interview the accused until Saturday, 9 April 2011. *See* Enclosure 30.

SPCMCA#2's decision to exclude this period of delay was reasonable. *See United States v. Hirsch*, 26 M.J. 800 (A.C.M.R. 1988). In *Hirsch*, the court ruled that the time necessary to

complete the sanity board was reasonable given the complexities of the case, such as the requirement to conduct "psychological testing, an interview with an outside witness, and consultation with the defense counsel to ensure essential aspects were considered before the report was completed." *Id*, at 803. Here, the above prerequisites for conducting the initial interview of the accused support the reasonableness of SPCMCA#2's decision.

2. Reasons for Exclusion

SPCMCA#2 explicitly based its decision to approve the extension upon the reasons enumerated in the sanity board's request. *See* Enclosure 12. SPCMCA#2 memorialized his decision to exclude this period of delay in the accounting memorandum prepared later that day. *See* Enclosure 28. In fact, SPCMCA#2 cited six reasons supporting his decision. *See id*. The defense again argues the decision granting the delay must include justification to the defense's satisfaction. *See* RCM 707(c), discussion.

C. Period #3 (18 March 2011 – 22 April 2011) (36 days)

On 15 April 2011, the sanity board requested an extension to complete its report. *See* Enclosure 30. That same day, SPCMCA#2 approved the sanity board's request for an extension of time to complete its report. *See* Enclosure 31. On 22 April 2011, SPCMCA#2 accounted for all excludable delay and listed the sanity board's request as one of the six bases for his decision. *See* Enclosure 28 (stating that SPCMCA#2 relied upon additional reasons to support his decision to exclude this period of delay (e.g., classification reviews, OCA approvals to disclose discovery to the defense), all of which are permissible reasons under RCM 707(c)).

SPCMCA#2's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#2 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See supra*; *see also Thompson*, 46 M.J. at 475; RCM 707(c), discussion; *McCullough*, 60 M.J. at 580; *Longhofer*, 29 M.J. at 27. The defense argues SPCMCA#2 abused his discretion by excluding this period of delay on two grounds: first, the sanity board's reasons for an extension to complete its report were "entirely illegitimate;" and second, SPCMCA#2 failed to state the reasons that justified excluding the delay.

1. Request for Extension

On 9 April 2011, the sanity board interviewed the accused. *See* Enclosure 30. On 15 April 2011, the sanity board requested an extension to complete its report. *See id*. The sanity board notified SPCMCA#2 that the board was "nearing finalization of the report, but [] had limited availability to meet as a full board to discuss the report." *Id*. Finalizing the report required all three board members to submit their portion of the report and to review and approve the report in its entirety. The defense challenges the basis for the sanity board's request for more than seven days after interviewing the accused to complete its report.

The defense's own words contradict this argument. On 7 February 2011, the defense emailed the sanity board that the convening authority's suspense date for completion of the board was "aspirational" and that the board should "take the time necessary to conduct a thorough and

complete examination." Enclosure 1, at 0258. The defense noted that any request for an extension of time would "undoubtedly" be granted. *See id*. Here, to ensure the evaluation is "thorough and complete," the sanity board requested an additional week "to allow full and adequate time to discuss and review all pertinent findings." Enclosure 30.

Further, the complexities of the evaluation justify the reasonableness of the sanity board's request for more than seven days to complete its report. On 3 February 2011, SPCMCA#2 ordered the sanity board to consider, at a minimum, the results of psychological and neurological tests, the accused's mental health and medical records, interviews with the accused, and the charge sheet. *See* Enclosure 29. SPCMCA#2 also ordered the sanity board "to complete a comprehensive neurological examination to include a CAT scan." *Id*. The accused also received a brain imaging and neurological examination. *See* Enclosure 29. The accused also had an MRI and was seen by a neurologist. *See* Enclosure 1, at 0354. These measures support the sanity board's request for more than seven days to complete its report.

The defense analogizes the sanity board's request with the realities of military criminal practice. To the contrary, the sanity board was unable to complete its report by 16 April 2011 because of the cumulative effect caused by the combination of protecting classified information, the gravity of the accused's misconduct, and the multiple defense requests. The sanity board was unable to interview the accused until 9 April 2011 given, *inter alia*, the classified nature of the proceeding and the publicity arising from the accused's misconduct. Thus, SPCMCA#2 did not abuse his discretion in excluding this period of delay from the RCM 707 speedy trial clock.

2. Reasons for Exclusion

On 15 April 2011, SPCMCA#2 approved the sanity board's request for an additional week to complete its report. *See* Enclosure 31. SPCMCA#2 cited the sanity board's request as the basis for its decision. *See id*. On 29 April 2011, SPCMCA#2 memorialized its decision to exclude this period of delay for many reasons, to include the sanity board's request. *See* Enclosure 28. The defense again argues the decision granting the delay must include justification to the defense's satisfaction. *See* RCM 707(c), discussion.

D. Period #4 (22 April 2011 – 12 May 2011) (21 days)

On 29 April 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 25 May 2011. *See id*. SPCMCA#2's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#2 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See supra*; *see also Thompson*, 46 M.J. at 475; RCM 707(c), discussion; *McCullough*, 60 M.J. at 580; *Longhofer*, 29 M.J. at 27. The defense argues SPCMCA#2 abused his discretion by excluding this period of delay on two grounds: first, the prosecution failed to articulate why the period of delay was reasonable; and second, SPCMCA#2 failed to state the reasons that justified excluding the delay.

1. Reason for Delay

The discussion to RCM 707(c) provides that time to enable counsel to prepare for trial in complex cases, to secure evidence, and to obtain appropriate security clearances are reasons to grant a delay for speedy trial purposes. *See* RCM 707(c), discussion. If the reason for the delay is an enumerated exclusion, the prosecution shall be relieved from accountability, subject to the reasonableness of the delay. *See Longhofer*, 29 M.J. at 27. Here, the prosecution's request for SPCMCA#2 to exclude this period of delay was based on the complexities of the case, the time to secure evidence, and defense requests for, *inter alia*, security clearances. *See* Enclosure 11. SPCMCA#2 had good cause to exclude this period of delay from the speedy trial clock for these reasons.

i. *Complexity of Case*. There is very limited military precedent defining when preparing for a complex case justifies an excludable delay for speedy trial purposes. The Air Force Court of Criminal Appeals ruling in *Matli* is the most instructive with respect to this issue. *See United States v. Matli*, 2003 WL 826023 (A.F.C.C.A. 2003). In *Matli*, the appellant confessed to drug use and distribution and was placed in pretrial confinement. The Article 32 investigation "revealed 26 Air Force members involved in illegal drug use and distribution." *Id*, at 1. The government prosecuted the lesser offenders first, so that those offenders could assist in prosecuting the more serious cases, to include the appellant. The convening authority excluded sixty-eight days from the speedy trial clock based on the complexity of the case. The court found that the convening authority properly excluded this period of time. The court explained as follows:

> [t]he sheer volume of crimes – the numbers of uses and distributions of illegal drugs – made the appellant's case somewhat more challenging. But it was the logistical problems of making the witnesses available for trial that made [the] case complex. The 26 cases of drug abuse were interrelated, requiring the appointment of defense counsel from many other bases to avoid conflicts of interest. The large number of witnesses – each with their own counsel – made this case more complicated.

Id., at 5. In *Matli*, the court considered the scope of the charged offenses, the number of interested parties, and the logistical challenges of executing the court-martial in its analysis as to whether the complexity of the court-martial made the excluded delay reasonable.

There is much more federal precedent defining when case complexities justify an excludable delay for speedy trial purposes. Although the Speedy Trial Act (hereinafter "STA") does not apply to offenses under the UCMJ, the Court of Appeals for the Armed Forces (C.A.A.F.) "has cited it for guidance concerning military speedy trial issues. *See Cooper*, 58 M.J. at 57. Courts agree that R.C.M. 707 "is based on the [STA]" and is, "in many ways, the military version of the [STA]." *Dooley*, 61 M.J. 258, 263 (C.A.A.F. 2005); RCM 707, analysis; *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005). The STA permits a continuance on the finding that "the ends of justice…outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C.A. § 3161(h)(7)(A).

One of the enumerated factors in determining whether to grant a continuance includes "whether the case is so unusual or so complex, due to…the nature of the prosecution or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for trial itself within the time limits established by this section." 18 U.S.C.A. § 3161 (h)(7)(B); *see also United States v. Rojas-Contreras*, 474 U.S. 231, 236 (1985) (stating that courts are given "broad discretion to grant an exclusion of time when, in its view, the case's complexity requires that counsel have additional time to prepare in order to ensure a fair trial").

Granting a delay under the STA requires the court to ensure that the length of an excludable continuance is reasonably related to the needs of the case. *See United States v. LoFranco*, 818 F.2d 276 (2d Cir. 1987). Courts routinely exclude reasonable periods of time in cases where the necessity of gathering and producing a large amount of documents increases the complexity of a case. *See United States v. McGrath*, 613 F.2d 361 (2d Cir. 1979) (finding that a sixty day excludable delay was warranted in light of the large volume of documents, the large quantities of marijuana seized and "the unusual complexity of the factual determination to be made by the grand jury"); *United States v. Beech Nut Nutrition Corp*, 871 F.2d 1181, 1197 (2d Cir. 1989) (granting a continuance for complexity where government made available to defendants approximately 30,000 documents); *United States v. Kamer*, 781 F.2d 1380 (9th Cir. 1986) (granting a delay because there were numerous overseas document, most of which were in the Dutch language, and over seventy witnesses who resided in Europe).

SPCMCA#2 approved the delay only for so long as was necessary under the circumstances. Here, the Court appreciates the complexities of this case. *See* AE CLXXVII ("This is a complex case involving multiple government agencies and entities"). The accused is charged with stealing more than 700,000 documents from classified databases—an unprecedented amount of government information was compromised. The accused committed this misconduct while deployed to Iraq and the nation was engaged in two wars. The accused's criminal conduct caused a wide-spread government reaction – domestic and abroad – spanning more than sixty government organizations. These facts contributed to the complexities of this case, as memorialized in the Article 10 section of this response, and were considered by SPCMCA#2 in excluding this period of delay. *See supra* (specifically: (1) the complexities of the criminal investigation into the accused's charged misconduct; (2) securing classification reviews of classified information; (3) obtaining approvals to disclose classified and unclassified discovery to the defense; (4) defense requests, namely requests for a sanity board, experts, security clearances, classification reviews, and discovery; and (5) the discovery challenges given the scope and gravity of the accused's misconduct).

SPCMCA#2 cited the above complexities of this case as reasons supporting his decision to exclude this period of delay. *See* Enclosures 12 and 28.

ii. *Time to Secure Evidence*. SPCMCA#2 granted the prosecution's request for a delay to secure, *inter alia*, classification reviews and approvals to disclose classified evidence and discovery from other government organizations to the defense. *See* Enclosures 12 and 28. SPCMCA#2's decision to exclude this period of delay to secure evidence was not an abuse of discretion. *See United States v. Savard*, 2010 WL 4068964 (A.F. Ct. Crim. App. 2010)

(affirming the military judge's decision to grant the government a delay to secure the depositions of relevant witnesses). SPCMCA#2 only granted a delay for so long as was necessary to secure evidence.

SPCMCA#2 approved the delay only for so long as was necessary under the circumstances. *See United States v. Mahoney*, 28 M.J. 865, 867 (A.F.C.M.R. 1989). In *Mahoney*, it was required that the Assistant Chief of Staff, Intelligence, Headquarters United States Air Force agree to court-martial the accused, who had access to highly sensitive classified information. The government received approval after 91 days had lapsed. The court held that "delays occasioned by the need to process the case outside the local command are beyond the local command's control and are thus not accountable." *Id*. at 867 (interpreting the holding in *United States v. Higgins*, 27 M.J. 150 (C.M.A. 1988)). The court held that absent any "indication the [prosecution] was 'dragging its feet' in obtaining the necessary clearance, the period of delay was reasonable and not accountable to the [prosecution]." *Id*, at 867 ("[w]hether to proceed with the [appellant's] trial was a national security policy decision made at the highest level of the Air Force and beyond the control of the local commander and is not 'another incident of the normal processes of military justice'") (citing *United States v. O'Brien*, 1973 WL 14897 (C.M.A. 1973)).

iii. *Security Clearances*. On 2 September 2010, the defense requested appropriate security clearances for all members of the defense team, including defense experts. *See* Enclosure 36. By 3 February 2012, the Army G-2 had granted each member of the defense team the proper security clearance. *See* Enclosure 1, at 0242.

SPCMCA#2 approved the delay only for so long as was necessary under the circumstances. *See Longhofer*, 29 M.J. at 29 (excluding 21 days to obtain the clearance for a civilian defense counsel because "it is beyond cavil that obtaining a security clearance for a civilian lawyer in a highly classified case or any security case is an extraordinary event which consumes valuable time"). In *Longhofer*, a case involving highly classified information where all trial participants were required to receive a compartmentalized security clearance, the government took 36 days to obtain the necessary security clearance for the civilian defense counsel. The government argued the entire period of delay should be excludable as a matter of law. The Court rejected this argument, holding that the inquiry was "a mixed question of law and fact" and that only 21 of the 36 days that it took to obtain the civilian defense counsel's security clearance were reasonable because the defense counsel already had a security clearance with another agency. *See id*, at 29.

2. Reasons for Exclusion

On 29 April 2011, SPCMCA#2 approved the prosecution's request for a delay. *See* Enclosure 12. SPCMCA#2 cited the completion of the OCA disclosure request and OCA classification reviews as two of the bases of his decision. *See* Enclosures 12 and 28. On 12 May 2011, SPCMCA#2 accounted for his decision to exclude this period of delay for many reasons, to include OCA classification reviews, OCA consent to disclose classified information, and defense requests for classification reviews and appropriate security clearances. *See* Enclosure

28. The defense again argues the decision granting the delay must include justification to the defense's satisfaction. *See* RCM 707(c), discussion.

E. Period #5 (12 May 2011 – 17 June 2011) (37 days)

On 26 May 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 25 June 2011. *See id*. SPCMCA#2's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#2 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See supra*; *see also Thompson*, 46 M.J. at 475; RCM 707(c), discussion; *McCullough*, 60 M.J. at 580; *Longhofer*, 29 M.J. at 27. The defense argues SPCMCA#2 abused his discretion by excluding this period of delay on two grounds: first, the prosecution failed to articulate why the period of delay was reasonable; and second, SPCMCA#2 failed to state the reasons that justified excluding the delay.

The defense argument that SPCMCA#2 abused his discretion is without merit. *See supra* (i.e., complexities of the case, time to secure evidence, security clearances). Further, the defense again argues the decision granting the delay must include justification to the defense's satisfaction. *See* RCM 707(c), discussion.

F. Period #6 (17 June 2011 – 5 July 2011) (19 days)

On 26 May 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 25 June 2011. *See id*. On 5 July 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 27 July 2011. *See id*. SPCMCA#2's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#2 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See supra*; *see also Thompson*, 46 M.J. at 475; RCM 707(c), discussion; *McCullough*, 60 M.J. at 580; *Longhofer*, 29 M.J. at 27. The defense argues SPCMCA#2 abused his discretion by excluding this period of delay on two grounds: first, the prosecution failed to articulate why the period of delay was reasonable; and second, SPCMCA#2 failed to state the reasons that justified excluding the delay.

The defense argument that SPCMCA#2 abused his discretion is without merit. *See supra* (i.e., complexities of the case, time to secure evidence, security clearances). Further, the defense again argues the decision granting the delay must include justification to the defense's satisfaction. *See* RCM 707(c), discussion.

G. Period #7 (5 July 2011 – 10 August 2011) (37 days)

On 5 July 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 27 July 2011. *See id*. On 26 July 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the

delay between 22 April 2011 and 27 August 2011. *See id*. SPCMCA#2's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#2 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See supra*; *see also Thompson*, 46 M.J. at 475; RCM 707(c), discussion; *McCullough*, 60 M.J. at 580; *Longhofer*, 29 M.J. at 27. The defense argues SPCMCA#2 abused his discretion by excluding this period of delay on two grounds: first, the prosecution failed to articulate why the period of delay was reasonable; and second, SPCMCA#2 failed to state the reasons that justified excluding the delay.

The defense argument that SPCMCA#2 abused his discretion is without merit. *See supra* (i.e., complexities of the case, time to secure evidence, security clearances). Further, the defense again argues the decision granting the delay must include justification to the defense's satisfaction. *See* RCM 707(c), discussion.

H. Period #8 (10 August 2011 – 29 August 2011) (20 days)

On 26 July 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 27 August 2011. *See id*. On 29 August 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 27 September 2011. *See id*. SPCMCA#2's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#2 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See supra*; *see also Thompson*, 46 M.J. at 475; RCM 707(c), discussion; *McCullough*, 60 M.J. at 580; *Longhofer*, 29 M.J. at 27. The defense argues SPCMCA#2 abused his discretion by excluding this period of delay on two grounds: first, the prosecution failed to articulate why the period of delay was reasonable; and second, SPCMCA#2 failed to state the reasons that justified excluding the delay.

The defense argument that SPCMCA#2 abused his discretion is without merit. *See supra* (i.e., complexities of the case, time to secure evidence, security clearances). Further, the defense again argues the decision granting the delay must include justification to the defense's satisfaction. *See* RCM 707(c), discussion.

I. Period #9 (29 August 2011 – 14 October 2011) (47 days)

On 29 August 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 27 September 2011. *See id*. On 28 September 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 27 October 2011. *See id*. SPCMCA#2's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#2 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See supra*; *see also Thompson*, 46 M.J. at 475; RCM 707(c), discussion; *McCullough*, 60 M.J. at 580; *Longhofer*, 29 M.J. at 27. The defense argues SPCMCA#2 abused his discretion by excluding this period of delay on two grounds: first, the prosecution failed to

articulate why the period of delay was reasonable; and second, SPCMCA#2 failed to state the reasons that justified excluding the delay.

The defense argument that SPCMCA#2 abused his discretion is without merit. *See supra* (i.e., complexities of the case, time to secure evidence, security clearances). Further, the defense again argues the decision granting the delay must include justification to the defense's satisfaction. *See* RCM 707(c), discussion.

J. Period #10 (14 October 2011 – 16 November 2011) (34 days)

On 28 September 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 27 October 2011. *See id*. On 27 October 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 28 November 2011. *See id*. SPCMCA#2's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#2 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See supra*; *see also Thompson*, 46 M.J. at 475; RCM 707(c), discussion; *McCullough*, 60 M.J. at 580; *Longhofer*, 29 M.J. at 27. The defense argues SPCMCA#2 abused his discretion by excluding this period of delay on two grounds: first, the prosecution failed to articulate why the period of delay was reasonable; and second, SPCMCA#2 failed to state the reasons that justified excluding the delay.

The defense argument that SPCMCA#2 abused his discretion is without merit. *See supra* (i.e., complexities of the case, time to secure evidence, security clearances). Further, the defense again argues the decision granting the delay must include justification to the defense's satisfaction. *See* RCM 707(c), discussion.

K. Period #11 (16 November 2011 – 15 December 2011) (30 days)

On 27 October 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 28 November 2011. *See id*. On 16 November 2011, SPCMCA#2 approved the prosecution's request for a delay of the Article 32 investigation. *See* Enclosure 12. SPCMCA#2 excluded the delay between 22 April 2011 and 16 December 2011. *See id*. SPCMCA#2's decision to exclude this period of delay was not an abuse of discretion. SPCMCA#2 had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See supra*; *see also Thompson*, 46 M.J. at 475; RCM 707(c), discussion; *McCullough*, 60 M.J. at 580; *Longhofer*, 29 M.J. at 27. The defense argues SPCMCA#2 abused his discretion by excluding this period of delay on two grounds: first, the prosecution failed to articulate why the period of delay was reasonable; and second, SPCMCA#2 failed to state the reasons that justified excluding the delay.

The defense argument that SPCMCA#2 abused his discretion is without merit. *See supra* (i.e., complexities of the case, time to secure evidence, security clearances). The prosecution supplements the reasons for this delay with the logistics of prosecuting this case. Because of,

inter alia, the media attention arising from this case, MDW created OPLAN BRAVO to help facilitate the planning, support, and execution throughout the different phases and legal procedures in this case. The execution of OPLAN BRAVO was given a time frame of 30 days, from the time the order was given to the actual day of the hearing, to account for all the logistical coordination needed to execute the plan. *See supra* (the details of OPLAN BRAVO are detailed in the Facts section of this response); *see also* Enclosure 58 (filed under seal).

Further, the defense again argues the decision granting the delay must include justification to the defense's satisfaction. *See* RCM 707(c), discussion.

L. Period #12 (24 December 2011 – 2 January 2012) (10 days)

RCM 707(c) authorizes the convening authority to delegate the authority to grant a delay to an Article 32 investigating officer. *See* RCM 707(c), discussion; *Lazauskas*, 62 M.J. at 39 (holding that where the convening authority has delegated to an investigating officer the authority to grant any reasonably requested delays of the Article 32 investigation, then any delays approved by the Article 32 investigating officer are excludable from the speedy trial clock). On 16 November 2011, SPCMCA#2 provided the Article 32 Investigating Officer, LTC Paul Almanza, with special instructions for the Article 32 investigation and delegated to LTC Almanza the authority to "approve any reasonable delay of the Article 32 investigation." *See* Enclosure 61.

On 4 January 2012, LTC Almanza, the Article 32 IO, "exclude[d] as a reasonable delay the days between 23 December 2011 and 3 January 2012 when [he] did not work on the Article 32 Investigation." *See* Enclosure 1, at 0818. On 11 January 2012, the Article 32 Investigating Officer clarified as follows:

> Between 24 December 2011 and 2 January 2012, I did not work on this investigation. Of these ten days, six (24-26 December 2011 and 31 December 2011 – 2 January 2012) were federal holidays or weekend days. I worked on the investigation on 3-6 January 2012 and again from 9-11 January 2012, but not on 7-8 January 2012, which were weekend days. The period between 24 December 2011 and 2 January 2012 and between 7-8 January 2012 is excludable delay.

Enclosure 60. LTC Almanza is a Judge Advocate in the United States Army Reserve whose military orders detailing him as the Article 32 IO expired on 23 December 2012. LTC Almanza's civilian employer, DOJ, requested that he work in his civilian capacity between 24 December 2011 and 3 January 2012. *See* proffered testimony of LTC Almanza. Since LTC Almanza was unable to work on the investigation, LTC Almanza excluded this period of delay. The Article 32 IO's decision to exclude this period of delay was not an abuse of discretion. The Article 32 IO had good cause to exclude this period of delay and did so only for so long as was necessary under the circumstances. *See Thompson*, 46 M.J. at 475. The accused did not suffer any prejudice in light of this delay because LTC Almanza completed his investigation and report

within the timeline ordered by SPCMCA#2. *See* Enclosure 61 (ordering the Article 32 IO to "complete [the] investigation no later than sixty days from [16 November 2011]").

M. Period #13 (3 February 2012 – 22 February 2012) (20 days)

The "period of delay from the judge's receipt of the referred charges until arraignment is considered pretrial delay approved by the judge per RCM 707(c)[.]" Rules of Practice Before Army Courts-Martial, Rule 1.1, 26 March 2012. On 3 February 2012, the military judge was in receipt of the referred charges and properly excluded any delay until arraignment, consistent with the above rule. The defense argues this period of delay counts against the RCM 707 speedy trial clock; the rule, echoed by the Court, states otherwise. The speedy trial clock under RCM 707 was tolled from 3 February 2012 to 22 February 2012.

IV: Remedy

The remedy for violation of RCM 707 is dismissal of charges, either with or without prejudice, upon timely motion. *See* RCM 707(d). In dismissing with or without prejudice, the court considers the "[s]eriousness of the offense[,]…facts and circumstances that lead to dismissal[,]…impact of re-prosecution[,]…and any prejudice to the accused[.]" *Bray*, 52 M.J. 663 (A.F.Ct.Crim.App. 2000); *Proctor*, 58 M.J. at 792 (ruling that marijuana and offensive touching are not serious offenses); *United States v. Edmond*, 41 M.J. 419 (C.A.A.F. 1995) (dismissal without prejudice was proper for 41-day violation because sex crime against inebriated victim were serious offenses, no government bad faith, dismissal with prejudice would not lead to better administration of justice, and no indication accused suffered prejudice). Assuming, *arguendo*, the Court finds a violation of RCM 707, the above factors do not support dismissal of the charges with prejudice.

Here, the charged offenses are serious. *See supra*. The prosecution did not exercise bad faith in bringing the accused to trial, as the causes for the delay required significant government action and coordination, either at the request of the defense or to provide proper discovery to the defense. *See supra*. Lastly, the delay did not prejudice the accused; in fact, the delay was necessary to secure all discoverable evidence to ensure the accused could present a defense and prepare for trial.

ARTICLE 10

An accused's right to a speedy trial stems, in part, from Articles 10 and 33, UCMJ. *See United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003); *United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995). Article 10 is a "fundamental, substantial, personal right." *United States v. Mizgala*, 61 M.J. 122, 126 (C.A.A.F. 2005).

Article 10, UCMJ, assures the right to a speedy trial to military members by providing that "[w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." 10 U.S.C. 810 (2000); *see also United States v. Brevard*, 57 M.J. 789, 793 (A.C.C.A. 2002) ("reject[ing] the notion of a 'magic number' of

days in the application of Article 10"). Article 10 "is one of several protections in the UCMJ intended to prevent soldiers from being 'put in the clink and held there for weeks, sometimes months, before [being] brought to trial.'" *United States v. Simmons*, 2009 WL 6835721, at 5 (A.C.C.A. 2009) (citing *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 906 (1949) (statement of Mr. Anderson, Member, Subcomm. of the Comm. on Armed Services), *reprinted* in *Index and Legislative History, Uniform Code of Military Justice* (1950)).

The Article 10 right to speedy trial is triggered by "arrest or confinement." *See United States v. Hatley*, 2011 WL 2782023 (A.C.C.A. 2011). Arrest is "the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties ..." Manual for Courts-Martial (MCM), United States, Rule for Courts-Martial (RCM) 304(a)(3). Confinement is "physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses." RCM 304(a)(4); *see also Mizgala*, 61 M.J. at 122 (noting that courts "consistently stress[] the significant role Article 10 plays when Servicemembers are confined prior to trial"). Article 10 "does not terminate at arraignment, but rather extends to at least the taking of evidence." *See Cooper*, 58 M.J. at 60 (the "entire period up to trying the accused will be reviewed for reasonable diligence on the part of the Government").

Article 10 hinges on whether the government proceeded with "reasonable diligence." *See United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007) (courts interpret "immediate steps" under Article 10 to mean "not ... constant motion, but reasonable diligence in bringing the charges to trial") (quoting *Mizgala*, 61 M.J. at 127) (quotation marks omitted); *United States v. McClain*, 1 M.J. 60 (C.M.A. 1975) (ruling that "an accused and his counsel need not do anything to speed his case to trial" because "the obligation to proceed with dispatch is solely that of the Government and the obligation is especially heavy when an accused is in pretrial confinement"); *United States v. Kossman*, 38 M.J. 262 (C.M.A. 1993). Courts shall look at the proceeding as a whole and not mere speed. *See United States v. Mason*, 45 C.M.R. 163 (C.M.A. 1972) (ruling that "the essential ingredient is orderly expedition and not mere speed"). "Brief inactivity is not fatal to an otherwise active, diligent prosecution." *United States v. Schuber*, 70 M.J. 181, 188 (C.A.A.F. 2011) (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)).

Courts agree that there is no "magic number" to find an Article 10, UCMJ, speedy trial violation. *See United States v. McLaughlin*, 50 M.J. 217, 218 (C.A.A.F.1999); *United States v. Robinson*, 47 M.J. 506 (N-M. Ct. Crim. App. 1997) (ruling that a 234-day delay is reasonable); *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (a four-year delay is reasonable); *Simmons*, 2009 WL 6835721 (a 135-day delay is unreasonable); *Kossman*, 38 M.J. at 261 (holding that "nothing in Article 10 that suggests that speedy-trial motions could not succeed where a period under 90- or 120-days is involved."); *Mizgala*, 61 M.J. at 128 (117–day delay triggered the full *Barker* analysis); *Cossio*, 64 M.J. at 257 (117 days); *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F.2010) (145 days).

Instead, an Article 10 violation exists "where it is established that the [prosecution] could readily have gone to trial much sooner than some arbitrarily selected time demarcation but

negligently or spitefully chose not to[.]" *United States v. McCullough*, 60 M.J. 580, 583 (A.C.C.A. 2004) (citing *Kossman*, 38 M.J. at 261); *United States v. Hatfield*, 44 M.J. 22, 24 (C.A.A.F. 1996) (Article 10 violation where it took two months to identify defense counsel and to initiate discussions about scheduling an Article 32) (overruled on other grounds); *United States v. Calloway*, 47 M.J. 782 (N-M. Ct. Crim. App. 1998) (although accused arraigned 115 days after he was placed into pretrial confinement, government did not proceed with reasonable diligence where: no action taken during first 20 days of confinement; charges not preferred until day 55; defense counsel not appointed until day 76; and accused not served with charges until 22 day after referral). The "test is reasonable diligence, not textbook prosecution." Schuber, 70 M.J. at 188 (where the prosecution "did not prefer the charges, initiate an Article 32 investigation, forward the charges, or respond to three discovery requests, which included demands for a speedy trial, in a timely manner").

Courts consistently note that Article 10 creates a more exacting speedy trial demand than does the Sixth Amendment and provides an accused with broader rights than RCM 707. *See Cooper*, 58 M.J. at 60; *Reed*, 41 M.J. at 449; *Mizgala*, 61 M.J. at 122 (Article 10 does not address any specific excludible time periods as does RCM 707; rather, the entire period of time from inception of confinement or arrest until trial is examined when considering whether the government exercised reasonable diligence); *Simmons*, 2009 WL 6835721 (stating "Article 10 and its implementing rules create the most demanding and useful speedy trial protection in the United States") (citing Gilligan & Lederer § 4-32.00); *United States v. Edmond*, 41 M.J. 419 (C.A.A.F. 1995) (the prosecution can satisfy R.C.M. 707, yet violate Article 10).

It follows that Article 10 issues cannot be resolved simply by determining whether similar delays would have violated the Sixth Amendment. *See Thompson*, 68 M.J. 308 (C.A.A.F. 2010); *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999); *Mizgala*, 61 M.J. at 129 (military judge erred in limiting consideration of the procedural framework to a Sixth Amendment analysis). However, military courts do consider the factors laid out in the Sixth Amendment case of *Barker* in determining whether or not an accused's speedy trial rights were met under Article 10. *See Schuber*, 70 M.J. 188; *Birge*, 52 M.J. at 212 (It is proper for military courts to "consider the *Barker* factors—in the context of Article 10's 'immediate steps' language and 'reasonable diligence' standard—in determining whether a particular set of circumstances violates a servicemember's speedy trial rights under Article 10."). In fact, the framework to determine whether the Government proceeded with reasonable diligence includes balancing the *Barker* factors, which are the following: (1) the length of the delay; (2) the reasons for the delay; (3) whether the accused made a demand for a speedy trial; and (4) whether there was prejudice to the accused. *See Barker*, 407 U.S. at 532; *Birge*, 52 M.J. at 212; *Mizgala*, 61 M.J. at 129 (the factors from *Barker* are an apt structure for examining the facts and circumstances surrounding an alleged Article 10 violation). The *Barker* Court noted that none of the four factors are "necessary or [a] sufficient condition to the finding of a deprivation of the right of speedy trial," but "[r]ather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 530.

I: Length of Delay

The first factor under the *Barker* analysis is the length of the delay and "is to some extent a triggering mechanism, and unless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, 'there is no necessity for inquiry into the other factors that go into the balance.'" *Cossio*, 64 M.J. at 257 (citing *United States v. Smith*, 94 F.3d 204, 208 (6th Cir. 1996)). Thus, the initial question is whether the 867 days in which the accused has been awaiting court-martial is facially unreasonable in the context of this case. *See Schuber*, 70 M.J. at 188.[11] Simply glancing at the charge sheet and the number of compromised classified documents involved in this case, including entire databases containing over 700,000 government documents, overcomes any allegation of facial unreasonableness. *See* Charge Sheet.

The analysis under the first factor depends upon the circumstances of the case, to "include the seriousness of the offense, the complexity of the case, and the availability of proof." *See Schuber*, 70 MJ at 181 (citing *Barker*, 407 U.S. at 530–31). *But see Cossio*, 64 M.J. at 257 (without examining the seriousness or complexity of the charges, the Court concluded that a *Barker* inquiry was triggered by the 117-day delay where the accused had moved for a speedy trial); *Thompson*, 68 M.J. at 308 (Court found 145-day pretrial confinement period sufficient to trigger speedy trial inquiry, without considering the seriousness and complexity of the case). Additional circumstances unique to the Article 10 analysis of the first factor are "whether the accused was informed of the accusations against him, whether the Government complied with procedures relating to pretrial confinement, and whether the Government was responsive to requests for reconsideration of pretrial confinement." *Schuber*, 70 M.J. at 181 ("[w]hether the amount of time is facially unreasonable in an Article 10, UCMJ, context also depends on other factors specific to the purposes of Article 10, UCMJ, which is to prevent an accused from languishing in prison without notice of the charges and without an opportunity for bail").

A. Seriousness of the Offense

The CAAF in *Schuber* interpreted *Barker* to suggest that the seriousness of the offense is a consideration in the analysis of the first Barker factor. *See Schuber*, 70 M.J. at 181; *Barker*, 407 U.S. at 531 ("the delay that can be tolerated for an ordinary street crime is considerably less than for a *serious*, complex conspiracy charge" (emphasis added)). In *Schuber*, the appellant was placed in pretrial confinement based on a straightforward accusation of drug use. *See Schuber*, 70 M.J. at 188. Here, the charged offenses include multiple serious federal crimes (e.g., 18 U.S.C. 793, 18 U.S.C. 641, 18 U.S.C. 1030), as well as Article 104, UCMJ, a punitive article tantamount to treason. *See* Charge Sheet. The accused faces a sentence of life without the possibility of parole. The accused is charged with stealing more than 700,000 documents from classified databases—there is simply no analogous national security case in the history of the United States. The accused committed this misconduct while deployed to Iraq and the nation was engaged in two wars. The accused's criminal conduct caused a widespread government reaction – domestic and abroad – spanning more than sixty government organizations. Even the defense concedes the seriousness of the offense. *See* Defense Speedy Trial Motion, at 75. Accordingly, the seriousness of the charged offenses makes it clear that the processing of this case has been timely and there has been no unreasonable delay.

[11] The accused has been awaiting court-martial since 27 May 2010, which totals 867 days, as of the date of this response.

B. Complexity of the Case

The CAAF in *Schuber* interpreted Barker to suggest that the complexity of the case is another consideration in the analysis of the first Barker factor. *See Schuber*, 70 M.J. at 181; *Barker*, 407 U.S. at 531 ("the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, *complex* conspiracy charge" (emphasis added)). In *Schuber*, there was ongoing discovery throughout the seventy-one days when the government allegedly was not reasonably diligence. *See Schuber*, 70 M.J. at 181 (a contested case with ongoing discovery). Here, this is a complex case involving voluminous discovery originating from more than sixty government organizations, procedures governing classified information, and classified discovery for which OCA classification reviews and approval for disclosure is required. *See supra*. The complexities of this case are apparent in the criminal investigation, the need to retrieve classification reviews and approvals for disclosure of classified information, defense requests, namely requests for a sanity board, experts, security clearances, classification reviews, and discovery, and discovery given the scope and gravity of the accused's misconduct and the widespread United States Government reaction to the public releases of compromised information.

The charged misconduct was committed over a six-month period of time while the accused was deployed, but the second and third-order effects of the accused's misconduct continued long after the accused was arrested. Even the Court has acknowledged in rulings over the past seven months of pre-trial litigation that this is a complex case. *See* AE CCXXX at 1 ("This is a complex case involving hundreds of thousands of classified documents that are potentially discoverable."); *see also United States v. Morrison*, 22 M.J. 743 (N.M.C.M.R. 1986) (the government showed the complexities of the case and the unusually extensive efforts required to prepare for trial in a complicated scheme of larceny of records spanning 20 months, encompassing at least two dozen co-conspirators, and resulting in a loss of as much as one million gallons of aviations fuel and significant United States Government action).

The defense concedes that this case is complex, however, argues that "much of the complexity has been created by the [prosecution's] expansive charging decision." Defense Motion, at 75. To support this proposition, the defense merely cites its own previously-filed motions as "authority." Those motions, previously considered and denied by this Court, carry no weight at this juncture. The charging decision was driven by the scope and breadth of the accused's aggregate misconduct, as the individual responsible for the largest, wholesale disclosure of classified and sensitive information in the history of military justice. The accused's misconduct makes this case complex, not the prosecution's charging decision. *See infra*. In fact, the Charge Sheet reflects only a small sample of the accused's criminal acts. As such, the case complexity reveals that there was no unreasonable delay in this unprecedented case.

C. Availability of Proof

The CAAF in *Schuber* interpreted *Barker* to suggest that the availability of proof is a consideration in the first factor analysis. *See Schuber*, 70 M.J. at 181. In *Schuber*, the appellant was accused of drug use based on four positive urinalysis samples. *See id*. Both parties in

Schuber agreed that the case was a "straightforward class of classes." *Id*. Here, much of the proof was, for all intents and purposes, unavailable for a significant period of time. The accused initially confessed to his criminal acts in digital chats, wherein he compromised classified information. *See* Enclosure 26. The accused used multiple computer systems which generated more than fifteen separate computer forensic reports. *See id*. Nearly all the proof contains classified information spanning multiple equity holders from throughout the United States Government. Furthermore, even the original unclassified CID case file contained classified information that required approval for disclosure, thus delaying discovery.[12] Proving the accused committed the offenses for which he is charged required the prosecution to retrieve multiple informal and formal classification reviews and approvals for disclosure to the defense. *See infra*. The evidence in this case, the availability of which required both a classification review and approvals for disclosure from multiple OCAs, supports that the delay was not for a facially unreasonable length of time.

D. Additional Considerations

Additional circumstances unique to the Article 10 analysis of the first factor are "whether the accused was informed of the accusations against him, whether the Government complied with procedures relating to pretrial confinement, and whether the Government was responsive to requests for reconsideration of pretrial confinement." *Schuber*, 70 M.J. at 181. The prosecution notified the accused of the charges and complied with pretrial confinement procedures, including a twenty-four-hour report to the commander, a forty-eight-hour probable cause determination, the commander's seventy-two-hour memorandum, and a seven-day review. *See* Charge Sheet; Enclosures 5-7; RCM 305(h)-(i).

In addition, the accused immediately received military appointed defense counsel to ensure representation during the pretrial confinement hearing. The initial charges were preferred on 5 July 2010. *See* Enclosure 7. Additional charges were preferred on 1 March 2011 and the defense was provided with the additional charges on the following day. *See* Enclosure 1, at 0314. On 3 February 2012, the same day charges were referred, the accused and the civilian defense counsel were notified that the charges were referred. *See* Enclosure 63.

SPCMCA#2 was responsive to the accused's request for reconsideration of his placement in pretrial confinement. On 13 January 2011, the accused requested release from confinement under RCM 305(g). *See* Enclosure 64. On 20 January 2011, SPCMCA#2 requested a series of documents from Quantico in support of his review of the accused's confinement status. *See* Enclosure 65. On 21 January 2011, SPCMCA#2 denied the accused's request for release from confinement under RCM 305(g). *See* Enclosure 66. The defense stipulates to receiving this response in its Article 13 motion. *See* Defense Article 13 Motion, at 75. On 18 March 2011 and upon receipt of the additional charges and specifications preferred against the accused, SPCMCA#2 reviewed the accused's continued confinement. *See* Enclosure 67.

The additional considerations in this case support that the delay was not for a facially unreasonable length of time.

E. Periods of Inactivity Alleged by the Defense

The defense alleges multiple periods of government inactivity. In fact, of the 867 days since the accused entered pretrial confinement, the defense alleges that the prosecution was only active during a portion of the defense-requested sanity board (specifically 12 August 2010 to 3 March 2011), the Article 32 investigation (specifically 16 December 2011 to 22 December 2011), and the time period between 4 January 2012 and referral. The prosecution responds to each alleged period of delay in turn.

i. *27 May 2010 – 11 August 2010*. During this period, the prosecution, *inter alia*, was coordinating for a provider and proper facility for the sanity board in theater, OCONUS, and CONUS, transferring the accused to MDW, coordinating the order for a sanity board, and coordinating with USG entities and law enforcement. *See e.g.*, Enclosures 33, 14-15.

ii. *4 March 2011 – 18 March 2011*. During this period, the prosecution, *inter alia*, was coordinating the sanity board's interview of the accused, submitting written requests for approval to disclose classified information to the defense, and coordinating the review of the unclassified CID file for classified information. *See e.g.*, Enclosure 23. Additionally, and based on defense counsel's request, the prosecution was coordinating for the defense counsel to meet with the accused in a SCIF prior to accused's sanity board interview. *See* Enclosure 1, at 0319, 0321, and 0324 (although the prosecution arranged to have the accused ready to meet with the defense in a SCIF on 11 and 12 March 2011, on 7 March 2011 the defense counsel requested the prosecution to have a SCIF ready on 25 and 26 March 2011 in order to save money on flights).

iii. *18 March 2011 – 22 April 2011*. During this period, the prosecution, *inter alia*, coordinated the sanity board's interview of the accused on 9 April 2011, coordinated the approval to disclose classified charged documents, and requested approval to disclose classified information to the defense. *See e.g.*, Enclosures 23, 25, and 32. Additionally, the prosecution coordinated with SPCMCA#2 on multiple actions, coordinated with defense on Mr. Kucinich's visit to Quantico MCB, responded to the defense discovery requests, and processed defense requests for experts. *See* Enclosures 68 and 69.

iv. *22 April 2011 – 12 May 2011*. During this period, the prosecution, *inter alia*, coordinated the approval to disclose classified information, reviewed the FBI case file, coordinated the defense's request for a neuropsychologist, and discussed classification reviews with government organizations. *See e.g.*, Enclosures 23-25. Additionally the prosecution coordinated with SPCMCA#2 for approval of the defense request for experts and coordinated defense requests for information from the Joint Regional Confinement Facility. *See supra*.

v. *12 May 2011 – 17 June 2011*. During this period, the prosecution, *inter alia*, submitted multiple prudential search requests, requested access to the ONCIX damage assessment, and corresponded with government organizations concerning the prudential search request. *See e.g.*, Enclosures 53 and 57. Additionally, the prosecution began coordinating for a new military defense counsel's security clearance, and worked on defense requests for establishing processes for their computer forensic experts to conduct analysis, locations for

defense team offices and the capabilities of those offices, and special accommodations requested by the defense for when they visit Fort Leavenworth, Kansas. *See supra*.

vi. *17 June 2011 – 5 July 2011*. During this period, the prosecution, *inter alia*, corresponded with government organizations about the prudential search request, requested an appropriate security clearance for a member of the defense team, and submitted multiple written prudential search requests. *See e.g.*, Enclosure 53. Additionally, SPCMCA#2 issued a protective order governing law enforcement sensitive information and other sensitive information to facilitate discovery, SPCMCA#2 approved an additional facility for storage of classified information by the defense, and the prosecution produced the Secretary of the Army AR 15-6 investigation in discovery, in response to a defense request. *See* Enclosure 18.

vii. *5 July 2011 – 26 July 2011*. During this period, the prosecution, *inter alia*, coordinated OPLAN BRAVO procedures, coordinated the approval to disclose classified ODNI information to the defense, and produced CID information to the defense. *See e.g.*, Enclosure 58; *see also* Enclosure 18. Additionally, the prosecution developed a list of DOD organizations that DOD OGC could use as a template for disseminating the PSR. *See* Enclosure 54.

viii. *26 July 2011 – 29 August 2011*. During this period, the prosecution, *inter alia*, coordinated for the classification review from CYBERCOM, requested the FBI case file, and produced the Secretary of the Army AR 15-6 investigation. *See e.g.*, Enclosures 17 and 18. Additionally, SPCMCA#2 approved the appointment of a defense expert in forensic psychiatry, SPCMCA#2 approved a defense request for computer hardware, and the prosecution began processing the FBI case file for discovery purposes.

ix. *30 August 2011 – 28 September 2011*. During this period, the prosecution, *inter alia*, coordinated the approval to disclose the classified information contained within the unclassified CID file, and submitted written requests for classification reviews. *See e.g.*, Enclosure 20. Additionally, the prosecution produced military intelligence investigations in discovery, and began processing the defense request for courier cards and the defense request for preservation of computer equipment. *See* Enclosure 18.

x. *29 September 2011 – 27 October 2011*. During this period, the prosecution, *inter alia*, requested to review any ONCIX and DIA damage assessment, submitted written requests for classification reviews, and submitted written preservation requests based on the defense's request. *See e.g.*, Enclosures 20 and 56. Additionally, the prosecution developed a system for the defense to contact CID/CCIU personnel for interviews, re-produced almost 50,000 pages of discovery, and submitted a PSR to DHS. *See* Enclosures 18 and 70.

xi. *14 October 2011 – 16 November 2011*. During this period, the prosecution, *inter alia*, presented its case, for both the merits and presentencing, to all defense counsel and their computer forensic experts. *See* Enclosure 44. On 17 November 2011, members of the prosecution travelled to Fort Leavenworth, Kansas and presented the same briefing to Mr. Coombs and the accused on 18 November 2011. *See* Enclosure 1, at 0710. The prosecution also submitted a written prudential search request, submitted a written request to review damage

assessments, and produced to the defense the forensic duplicates of the digital evidence and the more than fifteen classified forensic reports. *See e.g.*, Enclosures 18, 53, and 56.

xii. *15 November 2011 – 15 December 2011*. During this period, the prosecution, *inter alia*, coordinated OPLAN BRAVO, prepared for the Article 32 investigation, and coordinated receipt of the final classification review of the charged documents along with the Intelink classification review. *See* Enclosures 18, 58 (filed under seal), and 59.

xiii. *22 December 2011 – 3 January 2012*. During this period, the prosecution, *inter alia*, coordinated the accused's transportation to JRCF, requested meetings with government organizations to discuss the prudential search request, and worked on the Fiscal Year 12 expenses tracker. *See* Enclosure 1, at 0810.

xiv. *12 January 2012 – 2 February 2012*. During this period, the prosecution, *inter alia*, reviewed the Article 32 Investigating Officer's report, reviewed the FBI case file, responded to defense requests for additional funding for experts and for contact information for OCAs, and presented the case file and the Article 32 Investigating Officer's report to SPCMCA#2. *See* Enclosure 71. Additionally, the SJA presented the case to the GCMCA and the GCMCA reviewed the case file and the Article 32 Investigating Officer's report.

In short, the alleged periods of inactivity have no basis in fact and do not support that the delay was for a facially unreasonable length of time.

II: Reason for the Delay

As a second factor in balancing whether or not the prosecution complied with Article 10, the *Barker* Court explained that "closely related to length of delay is the reason the government assigned to justify the delay." *Barker*, 407 U.S. at 531. The Court continued that:

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defense. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id. The government must provide a reason for the delay. *See United States v. Laminman*, 41 M.J. 518 (C.G. Ct. Crim. App. 1994) (the fact that the "Government failed to present evidence explaining the reasons for the various delays in charging the accused, ordering the Article 32 investigation, detailing a defense counsel, and in commencing the Article 32 hearing at the outset, left the trial judge without evidence to conclude that the Government acted with reasonable diligence during these periods").

In the case at bar, there has been constant movement, andno deliberate or negligent delay.[13] The prosecution exercised, and continues to exercise, reasonable diligence both before and after the Article 32 investigation.

In determining whether or not a delay is reasonable, military courts again look to case complexity and observe that "[c]ase complexity is a key component in the diligence determination" under Article 10. *McCullough*, 60 M.J. at 586 (military exigency may constitute legitimate reason for delay); s*ee also Barker*, 407 U.S. at 530 (noting that "a 'serious, complex conspiracy charge' may warrant more delay than an 'ordinary street crime'"). The complex nature of a given case will serve as the sole justifiable basis for finding extraordinary delay, if the complexity was the proven cause of the delay. *See United States v. Cole*, 3 M.J. 220, 227 (C.M.A. 1977). The complexity of the investigation and preparation for trial, considering all the attendant circumstances, was such that "due care require(d) more than a normal time in marshaling the evidence" against the appellant. *United States v. Marshall*, 1973 WL 14746 (C.M.A. 1973); *see also United States v. Hatley*, 2011 WL 2782023 (ACCA 2011) (citing *United States v. Hatfield,* 44 M.J. 22, 23 (C.A.A.F.1991)).

The case has constantly been moving since the accused was placed in pretrial confinement; however, there are several complex issues, based on the circumstances of this case, that have required time to resolve. Specifically, the government will map out the complexities in five discrete areas of this case: (1) the complexities of the criminal investigation into the accused's charged misconduct; (2) securing classification reviews of classified information; (3) obtaining approvals to disclose classified and unclassified discovery to the defense; (4) defense requests, namely requests for a sanity board, experts, security clearances, classification reviews, and discovery; and (5) the discovery challenges given the scope and gravity of the accused's misconduct, pre- and post-referral.

A. Investigation

The investigation of the accused's misconduct began on 25 May 2010 when Mr. Adrian Lamo reported to the United States Government that the accused admitted to disclosing thousands of classified documents to WikiLeaks, an organization that maintains a website dedicated to leaking compromised private and classified information, that had already publicly released several other classified documents belonging to the United States Government in prior months. On 27 May 2010, CID was notified of the accusations made against the accused and *immediately* began its investigation. *See* Enclosure 8. That same day, CID executed a valid search authorization and seized various materials, including a compact disc located in a United States Postal Service mailing box, which was marked with a "SECRET" label.[14] *See* Enclosure 26 (dated 22 Sept 11).

[13] Article 10 does not require "constant motion," yet, here, that is what has happened. *See Cossio*, 64 M.J. at 256 (courts interpret "immediate steps" under Article 10 to mean "not ... constant motion, but reasonable diligence in bringing the charges to trial") (quoting *Mizgala*, 61 M.J. at 127) (quotation marks omitted)

[14] This video is the charged document for Specification 2 of Charge II. *See* Charge Sheet.

On 27 May 2010, the accused was placed under supervision and required an escort. On 29 May 2010, the command ordered the accused into pretrial confinement. On 30 May 2010, a Military Magistrate approved the command's decision to confine the accused. The Military Magistrate's findings revealed the status of the investigation at that juncture:

> PFC Manning remains a threat to national interests if released. PFC Manning indicated he collected declassified [sic] materials for over a year. It is unknown how much information he collected or how the information is stored. It is highly likely that if PFC Manning is released he will continue to commit physical acts of violence or leak additional classified information to the detriment of national interests.

Enclosure 5. Since that time, the investigation of the accused has evolved *significantly* as the law enforcement investigative agencies became involved and the totality of the criminal conduct and its rippling effect on the United States Government became apparent.

From 27 May 2010 until 25 July 2010, the investigation of the accused focused on determining exactly what the accused compromised, the methods by which he carried out his criminal act, and what information could still be potentially released. During that time, WikiLeaks continued to publicly release several other purported classified documents belonging to the United States Government. *See* Facts.

CID, FBI, and DSS continued investigating to understand the scope of the accused's misconduct—a challenging task considering the charged conduct was committed by an Army Intelligence Analyst with access to classified information and transpired in combat. This initial joint investigation again reveals the complexities inherent in the accused's misconduct. *See United States v. Haridat*, 2012 WL 70589 (N-M. Ct. Crim. App. 2012) (the incident was originally investigated by civilian authorities, involved over 60 pieces of physical evidence, multiple victims, interviews of 15–20 witnesses, a defense requested RCM 706 examination, forensic testing such as gunshot residue, ballistic and DNA testing, collection of videotaped interviews and recorded 911 calls from different city and county police departments, and the prosecution of two cooperating witnesses).

In the meantime, the United States Government was initiating other measures to assess the damage, if any, caused by the unauthorized disclosures. On 5 August 2010, days after the CIDNE Afghanistan release, Defense Secretary Robert Gates directed the DIA to establish the IRTF to determine what classified documents were posted on WikiLeaks, what other classified documents were compromised, and to memorialize what, if any, damage was caused by the compromised documents. *See* Enclosure 4 to AE XLIX. The prosecution met with the IRTF to discuss the scope of the mission and its effect on the court-martial. *See* Enclosure 1, at 0011. During those discussions, a necessary byproduct of the accused's misconduct and the prosecution's attempts to maintain awareness of other the actions of other government entities,, the prosecution gained access to additional resources that assisted in furthering the criminal investigation and developing the body of information to search for discovery purposes.

Throughout the remainder of 2010, WikiLeaks publicly released, among other things, purported CIDNE Iraq records and purported DOS cables. *See* Enclosure 3. On 1 March 2011, equipped with a better understanding of the magnitude of criminal activity, additional charges were preferred against the accused. *See United States v. Proctor*, 58 M.J. 792 (A.F. Ct. Crim. App. 2003) (no Article 10 violation where government did not prefer charges until the accused had served 107 days in pretrial confinement; government entitled to thorough investigation before preferral of charges and acted with "reasonable diligence" after preferral). Ultimately, each public release by WikiLeaks altered either the focus of the investigation, the charging decision, or the discovery obligations of the prosecution. For instance, after the CIDNE Afghanistan release, the FBI formally joined the investigation; after the release of purported DOS cables, DOS underwent significant measures to mitigate any potential damage, creating additional discovery obligations for the prosecution. Further, in some cases, the releases led to the discovery of additional evidence, such as classified audit log files containing thousands of lines of data that required extensive coordination to produce in discovery.

Due to the amount of classified information involved, the CID case file consists of investigative and forensic sub-files that are both classified and unclassified. CID's regulation requires a classification review of their file prior to release. *See* Enclosure 72.[15] The prosecution became aware that the unclassified CID case file may contain potentially classified information. In an effort to assist CID with the classification review based on the prosecution's previously established relationships with the Army G-2 security office and members of the intelligence community, the prosecution coordinated with the Army G-2 office for their review of the CID file. The Army G-2 office confirmed there was classified information in the unclassified file and identified the two equity holders of that information. *See* Enclosure 2. On 19 May 2011, among other dates, the prosecution requested that those two equity holders review the applicable portions of the case file for classified material. *See* Enclosure 11. During this time, the prosecution produced those portions of the CID file that were not classified. *See* Enclosure 18. On 8 September 2011, the prosecution retrieved approval to disclose the classified material to the defense. *See* Enclosure 25. After receiving approval, the prosecution coordinated with the government organizations to retrieve a properly marked classified version of those applicable portions of the CID case file. In November 2011, the prosecution produced the CID case file. *See* Enclosure 18.

The CID case file also consists of forensic reports. *See* Enclosure 26. The forensic reports were created from the classified and unclassified digital media collected in this case. Prior to producing forensic images of the collected drives, and the derivatively classified forensic reports, the prosecution consulted with each federal organization and their OCAs that had an equity in the drives. After conducting a due diligence search of the drives with the assistance of security experts, the prosecution sent requests for consent to produce classified information in discovery to the OCAs of the charged documents or information, and any other OCAs that could reasonably be identified during the search of the hard drives. *See* Enclosure 23. Based on classified information being inextricably commingled on the digital media, the prosecution was required to withhold discovery of the forensic images until consent was received from all the

[15] This enclosure will only be used by the prosecution, if the Court issues a MRE 506 protective order, pursuant to the government's collateral motion for such a protective order.

relevant OCAs, either because they were the OCA of a charged document or because they were an OCA identified as a result of the due diligence search of the digital media. *See* Enclosure 26 (each forensic report which focuses on analysis of digital media, not only references classified information found on that media, but also other classified information found across other media).

The complexities of the investigation were a major reason for the necessity of the delay. *See United State v. Cole*, 3 M.J. 220 (C.M.A. 1977). In *Cole*, on the night of graduating Advanced Individual Training (AIT) at Fort Sill, Oklahoma, the appellant and other co-conspirators committed acts of sodomy that led to the death of a fellow Soldier. The appellant, convicted pursuant to pleas of guilty to murder and sodomy, argued a violation of his speedy trial rights. The Court of Military Appeals identified two features of the case that caused the delay: the unusual circumstances surrounding the need to obtain witnesses and the "unusual amount of evidence of a scientific nature." *Id*. at 226. Because many of the witnesses had departed Fort Sill after AIT graduation, the Court noted that the difficulty of identifying and gathering material witnesses was "extraordinary." Here, identifying and gathering evidence was similarly extraordinary because of the rolling public disclosures of the compromised material after the accused entered pretrial confinement. Each release shifted and expanded the focus of the investigation. The evidence and witnesses sought (to include the type of evidence sought (e.g., audit logs)) in order to conduct a thorough investigation were scattered across the world.

Additionally, this case involves a significant amount of forensic evidence. The accused is charged with numerous offenses, including violations of 18 U.S.C. 1030 and 18 U.S.C. 793. The CID forensic reports total approximately 330,000 pages. *See* Enclosure 26. Further, because those reports include classified information originating from several government organizations, disclosing the forensic reports to the defense required approval from each applicable OCA. In *Cole*, the Court noted that the "gathering, processing, analyzing, and considering the bulk of physical evidence in the investigation of the case against this appellant…may fairly be described as an unusual forensic investigation requiring the efforts of two laboratories, and it was an investigation which was performed and monitored with care and conscientiousness." *Id*. at 227. Similarly, in this case, the total amount of forensic computer evidence is staggering based on the severity and breadth of the accused's misconduct.

B. Classification Reviews

Before referral, a classification review is necessary to establish the classification of the evidence to meet an element of the charge. Classification reviews of the charged documents were required to be completed before the Article 32 investigation in order to ensure a thorough and impartial investigation. Additionally, classification reviews inform the parties on the proper handling and storage of information during discovery. Since preferral of the original charges on 5 July 2010, the prosecution has been coordinating with those organization referenced on the original charge sheet for classification reviews. As WikiLeaks released more purportedly classified documents and the investigation of the case evolved, the prosecution preferred additional charges on 1 March 2011 to capture the extent of the accused's misconduct. The prosecution submitted multiple requests, both informally via email and formally in writing, for those organizations to complete classification reviews. *See* Enclosure 20. The prosecution repeatedly requested updates on the status of the classification reviews. *See id*.

The complexities of this case are again evidenced in the necessity of and process of obtaining classification reviews. Nonetheless, the prosecution expeditiously and constantly moved the case forward. The processing of this case far exceeds that of *Mizgala*, where there was no Article 10 violation, which the CAAF ruled as follows:

> The processing of this case is not stellar. We share the military judge's concern with several periods during which the Government seems to have been in a waiting posture: waiting for formal evidence prior to preferring charges and waiting for a release of jurisdiction for an offense that occurred in the civilian community. There are periods evidencing delay in seeking evidence of the off-post offense and seeking litigation packages to support prosecution of the drug offenses. Nevertheless, constant motion is not the standard so long as the processing reflects reasonable diligence under all the circumstances. Our evaluation must balance the delay against the reasons for these periods of delay (such as the need to investigate offenses and obtain evidence), with the need to coordinate investigation and jurisdiction with civilian authorities. Once these necessary steps were completed, the Government moved expeditiously to refer the charges.

Mizgala, 61 M.J. at 129. In the case at bar, the prosecution was never just in a waiting posture—if the prosecution was waiting for the completion of a task by another organization, the prosecution was concurrently moving other necessary pieces of the case forward (e.g., approvals to disclose classified information, defense requests (discovery, experts, security clearances, etc.), search for discoverable information under *United States v. Williams*, 50 M.J. 441, 446 (C.A.A.F. 1999)).

C. Approvals for Disclosure

Since preferral of the original dismissed charges, the prosecution has been working with all applicable government organizations for approval to disclose classified information to the defense. The source and the content of the discovery again reveal the complexity of the case. Retrieving approval was a labor-intensive process because of the amount of classified information involved in this case, compounded by the numerous defense discovery requests for classified information and the widespread reaction by the United States Government. As explained above, the prosecution has sought, coordinated, and received approval from dozens of government organizations. Approvals to disclose material originating from the Intelligence Community required the most prosecutorial and interagency action. *See United States v. Caves*, 2005 WL 2704965 (N-M. Ct. Crim. App. 2005) (noting "that much of the requested information was held by civilian sources and obviously was highly sensitive; these facts alone offer sufficient explanation for the complained of delays"). In particular, production of the IRTF final report and the ONCIX damage assessment demonstrate the complexity of the discovery approval process.

i. *IRTF Final Report*. On 25 October 2011, the prosecution requested approval to disclose the classified IRTF Final Report to the defense. *See* Enclosure 24. DIA reviewed the report and identified multiple government organizations with potential equities in the report. Based on coordination with those organizations, on 18 May 2012, the prosecution submitted a motion for limited disclosure of the IRTF report under MRE 505(g)(2). *See* AE CXXXII. The prosecution has made the report available to the defense for inspection.

ii. *ONCIX Damage Assessment*. Beginning in February 2011, the prosecution requested authority to review the ONCIX damage assessment, or at a minimum those individual assessments provided to ONCIX. On 13 July 2012, the prosecution first reviewed the ONCIX draft damage assessment. Because the draft ONCIX damage assessment considered the equities of dozens of organizations, the prosecution and ONCIX were required to coordinate with multiple equity holders of classified information in the ONCIX assessment for approval to disclose to the defense. *See* Enclosure 57. On 3 August 2012, the prosecution filed a motion for limited disclosure under MRE 505(g)(2) for the ONCIX draft damage assessment, which the Court granted on 23 August 2012. *See* AE CCLV. The prosecution has made the ONCIX draft damage assessment available to the defense for inspection.

D. Defense Requests

Defense requests are also one of many factors the Court may consider in determining whether the prosecution was reasonably diligent. Courts note that "[w]here the defense affirmatively seeks a delay or where it consents to a delay or where it requests government action which necessarily requires reasonable time for accomplishment, then the defense waives government speedy-trial accountability for those periods of time." *McCullough*, 60 M.J. 580. The right to a speedy trial is a shield, not a sword. *See King*, 30 M.J. at 66 (stating that "[a]n accused cannot be responsible for or agreeable to delay and then turn around and demand dismissal for that same delay"). Pre-referral, the defense submitted numerous requests, to include requests for a sanity board, security clearances, experts, resources, and discovery. *See e.g.*, Enclosures 11, 35, 36, 68.

i. *Sanity Board*

On 12 July 2010, the defense requested a sanity board. That same day, SPCMCA#2 approved the defense's request. The government, *before the defense made this request*, contacted multiple health care professionals, to include the USF-I Surgeon, and confinement facilities to establish a sanity board. *See* Enclosure 33. On 29 July 2010, in an effort to provide the accused with necessary behavioral health care and a full sanity board, the accused was transferred to Quantico and, on 3 August 2010, SPCMCA#2 ordered a sanity board. Beginning 25 August 2010, the defense submitted an additional ten requests relating to the sanity board, including requests for each member of the defense team, including any defense expert, and the members of the sanity board. The prosecution coordinated with the Army G-2 office to grant each member of the defense team a TS-SCI security clearance. *See infra*. Based on the defense's proffer, SPCMCA#2 ordered a PCR which did not complete until December 2010. *See* Enclosure 49. On 22 April 2011, the sanity board submitted its findings. *See* Enclosure 32.

ii. *Experts*

In total, the defense has requested nine experts, of which eight were approved. On 16 July 2010, the defense requested a forensic expert. On 23 July 2010, the defense's request was approved. On 25 August 2010, the defense requested an expert consultant in forensic psychiatry. On 17 September 2010, the defense's request was approved. On 28 September 2010, the defense requested a second security expert consultant. On 12 October 2010, the defense's request was approved. On 28 October 2010, the defense requested an Information Awareness expert. On 14 January 2011, the defense's request was approved. On 29 November 2010, the defense requested a national security investigator to assist the defense. On 17 December 2010, the defense's request was denied. On 12 January 2011, the defense requested a new forensic psychiatry expert. On 14 October 2011, the defense's request was approved. On 18 February 2011, the defense requested a neuropsychology expert. On 5 April 2011, the defense's request was approved. On 20 April 2011, the defense request a neuropsychology expert located at Fort Leavenworth, Kansas. On 4 May 2011, the defense's request was approved. On 3 August 2011, the defense requested a new forensic psychiatry expert identified by the defense. On 9 August 2011, the defense requested two forensic experts. On 10 August 2011, the defense's request was approved. On 10 August 2011, the defense's request was denied, in part, and a new forensic psychiatry expert was appointed.

iii. *Resources*

The defense has also requested that the government purchase equipment for the defense. On 6 August 2011, the defense requested that the government purchase computer hardware and software. *See* Enclosure 1, at 0582. On 16 September 2011, the prosecution provided the requested equipment to the defense. On 30 September 2011, the defense requested that the government purchase automation and classified supplies. *See* Enclosure 1, at 0669. On 28 November 2011, the defense requested additional computer software equipment. On 2 December 2011, SPCMCA#2 approved the defense's request, dated 28 November 2011. *See* Enclosure 1, at 0750.

iv. *Discovery*

On 29 October 2010, 1 November 2010, 15 November 2010, 8 December 2010, 10 January 2011, 16 February 2011, 13 May 2011, 13 October 2011, 15 November 2011, 16 November 2011, 20 January 2012, 26 June 2012, 9 July 2012, 19 July 2012, and 1 August 2012, the defense submitted discovery requests to the prosecution.[16] *See* Enclosure 68. The defense submitted approximately 178 individual discovery requests, a significant majority of which were pre-referral. *See id*. The breadth of these requests ranged from standard requests (e.g., a complete copy of the CID file), requests for classified information (e.g., any damage assessment prepared by an OCA), requests for all documents within several government organizations (e.g., any and all documents and reports conducted by the Department of Defense, Department of

[16] These requests do not include the three Motions to Compel Discovery post-referral and the three requests to compel discovery and production pre-referral. *See* Enclosure 74; AE VIII, ICVI, and CCILIII. The prosecution is providing its response to the defense's request dated 19 July 2012. *See* Enclosure 69.

Justice, etc.), and requests for information from high-level government officials (e.g., President Barack Obama, Secretary of State Hillary Clinton, Congressmen, and Senators). The prosecution responded to each of these approximately 178 requests pre-referral, and the defense chose to pursue these requests through motions to compel discovery post-referral. *See* Enclosure 69.

Post-referral, the defense has requested discovery from several additional government organizations. For instance, on 27 June 2012, the defense requested that the prosecution review all CYBERCOM records for information material to the preparation of the defense. *See* Enclosure 1, at 1273. The prosecution immediately, on 3 July 2012, submitted a Prudential Search Request to CYBERCOM and reviewed material responsive to the its request. *See* Enclosure 73.[17] The prosecution subsequently produced this material. *See* Enclosure 18.

In short, the prosecution has timely complied with the defense's numerous requests both pre- and post-referral.

E. Scope and Gravity of Criminal Act

The accused is charged with stealing more than 700,000 documents from classified databases. *See* Charge Sheet. His conduct, coupled with the public release of those documents by WikiLeaks over an eighteen month span, resulted in a widespread government reaction—to minimize any damage resulting from the unauthorized disclosures, to prepare for forthcoming releases, and to investigate the extent of the accused's misconduct. In sum, a total of seven OCAs maintain equities in charged documents or digital forensic evidence. Three law enforcement agencies have engaged in investigative activities at various times in this case. The prosecution contacted more than 60 government organizations based on its obligations under *Williams*, 50 M.J. at 446 and its ethical obligations. Most of these organizations were contacted in the absence of defense request.

The defense is asking the Court to ignore those facts. Instead, the defense chooses to focus on arguments previously brought before the Court and asks the parties to ignore the incredible amount of discovery produced to the defense. From day one, the prosecution has sought to mirror open file discovery for a case involving an overwhelming amount of classified information. *See* AE XLII, at 4 ("[t]he prosecution has, and will continue to, mirror the open file discovery system as much as practicable").

To support its argument, the defense relies almost extensively on the unpublished opinion of *Simmons*, 2009 WL 6835721. In *Simmons*, the Court found the government violated the accused's Article 10 rights because the reasons for the delay were insufficient. The government argued the reasons for the delay included, *inter alia*, the inexperience of the prosecution, with a heavy caseload of 2-3 preferred court-martials, and a scheduled brigade training exercise. The Simmons court found that the prosecution did not have a heavy caseload, that the time it took the Article 32 Investigating Officer to complete its report was excessive, that the case did not

[17] The prosecution reviewed all CYBERCOM records responsive to its Prudential Search Request during the Article 39(a) session.

involve complex evidentiary issues or time-consuming forensic evaluations, that the investigation undertaken in the case was *de minimus*, and that the prosecution negligently interpreted the SOFA agreement relating to jurisdiction of the case. The court found that the government's negligence stymied the processing of the case.

This Court should not be persuaded by *Simmons*. The case neither serves as precedent, nor involves facts analogous or relevant to this case. Additionally, *Simmons* is not persuasive in any way, as it was decided based on specific facts and unique circumstances that are not present here. In contrast to *Simmons*, this case is incredibly complex, as the investigation resulted in 22 time-consuming forensic evaluations. Further, the investigation involved, at one time, three separate law enforcement entities. Finally, the defense alleges negligence based upon the prosecution's interpretations of discovery, yet the defense fails to demonstrate how those interpretations resulted in any delay.[18] The Court has made no finding to the contrary. *See* AE CLXXVII at 2 ("the Court makes no findings of lack of due diligence by the Government"). Instead, the reason for the delay includes, *inter alia*, the prosecution's compliance with its discovery obligations in light of the scope and gravity of the accused's misconduct. *See United States v. Taylor*, 2010 WL 5162804 (N-M. Ct. Crim. App. 2010) (delay was excluded where the "delay was prompted by the defense request for a mental evaluation and necessitated by the review of tens of thousands of images from the [accused's] computer").

In sum, the accused has yet to be brought to trial for the following reasons: (1) the complexities of the criminal investigation into the accused's charged misconduct; (2) securing classification reviews of classified information; (3) obtaining approvals to disclose classified and unclassified discovery to the defense; (4) defense requests, namely requests for a sanity board, experts, security clearances, classification reviews, and discovery; and (5) the discovery challenges given the scope and gravity of the accused's misconduct, pre- and post-referral. All of these circumstances, both individually and collectively, demanded a significant amount of time for completion. As such, because of these reasons, the second prong of the *Barker* analysis weighs heavily in favor of the government.

III: Demand for Speedy Trial

The third factor in determining whether the government violated the accused's Article 10 rights is whether the defense demanded a speedy trial. *See Barker*, 407 U.S. at 530. The defense argues it demanded a speedy trial on 13 January 2011 and 25 July 2011.[19] The prosecution addresses each alleged demand in turn.

A. 13 January 2011.

[18] The prosecution has always interpreted *Brady* to apply to the merits and sentencing. From the onset of this case, the prosecution has not waivered from that position. *See* AE XVI at 5 ("the prosecution shall disclose evidence that is favorable to an accused and that is material either to guilt or punishment").

[19] On 9 January 2011, the defense also requested a speedy trial. For the reasons provided herein, that request was not legitimate.

On 12 July 2010, the defense requested a delay of the Article 32 investigation until completion of a sanity board. *See* Enclosure 11. SPCMCA#1 approved the defense's request for a delay. *See* Enclosure 12. On 12 August 2010, SPCMCA#2 approved the defense's request, dated 11 August 2010, for delay of the Article 32 investigation until completion of the sanity board. *See* Enclosure 12. On 26 August 2010, the defense proffered that the accused would need to divulge classified information to the sanity board. *See* Enclosure 22 (requesting all classification reviews completed by any OCA). On 2 September 2010, the defense requested that all members of the defense team receive the proper security clearance and read-on requirements, thus necessitating further delay. *See supra*. On 17 September 2010, SPCMCA#2 ordered a PCR based on the defense's proffer that the accused would need to divulge TS-SCI material during the sanity board. *See* Enclosure 40. On 13 December 2010, the PCR was completed and confirmed that the accused could divulge TS-SCI material during the sanity board. *See* Enclosure 49. In preparation for the forthcoming order from SPCMCA#2 to restart the sanity board, the prosecution proactively sought security clearances for the parties. On 13 January 2011, the prosecution requested security clearances for, *inter alia*, the sanity board members, Mr. David Coombs, and CAPT Moore, based on a defense request for all defense experts to have TS-SCI security clearances. *See* Enclosure 50.

During the preparation for the defense-requested sanity board and coordination for the defense-requested security clearances, on 9 January 2011 and 13 January 2011, the defense submitted a demand for a speedy trial. These requests were not bona fide demands for an immediate trial. The defense demanded a speedy trial during the period of defense-requested delay excluded by SPCMCA#2. *See Taylor*, 2010 WL 5162804 (making two speedy trial demands only after the defense submitted a request for a sanity board is disingenuous). Further, "where [the defense] requests government action which necessarily requires reasonable time for accomplishment, then the defense waives government speedy-trial accountability for those periods of time." *McCullough*, 60 M.J. 580 (citing *King*, 30 M.J. at 66) (overruled on other grounds)). The defense requests were not proper demands for a speedy trial.

B. <u>25 July 2011</u>.

On 25 July 2011, the defense submitted a demand for a speedy trial. *See* Enclosure 1, at 0561. On 13 July 2011, SPCMCA#2's Accounting of Excludable Delay memorandum notified the defense that the prosecution was still working on the defense's requests for classification reviews and security clearances. *See* Enclosure 28. During that time, the prosecution was working on those defense requests. *See* Enclosure 20. Further, the prosecution was still coordinating for the discovery enumerated in the seven discovery requests that predated this demand for speedy trial. Much like the defense's previous request for a speedy trial, the defense's demand on 25 July 2011 was not bona fide. *See Kossman*, 38 M.J. at 262 ("[s]tratagems such as demanding speedy trial now, when the defense knows the Government cannot possibly succeed, only to seek a continuance later, when the Government is ready," C.A.A.F. has held, "may belie the genuineness of the initial request"). Thus, the third factor in the *Barker* analysis is not met.

IV: Prejudice

The fourth factor in determining whether the government violated the accused's Article 10 rights is whether the accused was prejudiced. *See Barker,* 407 U.S. at 530. The test for prejudice should be viewed with respect to the interests that the speedy trial right was designed to protect: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. *See Barker,* 407 U.S. at 532 (ruling the last interest as the most important). The *Proctor* court observed that "justice is frustrated when the accused is held in pretrial confinement for an unreasonably long time," yet emphasized that merely being in jail is not enough prejudice in the analysis. *Proctor,* 58 M.J. at 792; *see also Edmond,* 42 M.J. at 419 (courts agree that stress alone is not prejudicial *per se*). The defense alleges that the accused was prejudiced because of his pretrial confinement conditions and because the delay impaired his defense.

The defense rehashes their Article 13 argument in an attempt to demonstrate that the accused's pretrial confinement constitutes prejudice. However, the Article 13 hearing will reveal that was not the case. The accused was able to visit with family, friends, and anyone else he chose to add to his visitor list during pretrial confinement, and could have made phone calls but chose not to use the telephone. *See* Government's Response to Article 13. The only restrictions placed on the accused in pre-trial confinement were to prevent him from escaping and to prevent him from committing suicide due to his suicidal ideations, which he had acted on by creating nooses. *See id*. Additionally, the accused's pretrial confinement in no way detrimentally impacted his defense. The accused was able to discuss his case with his defense attorney as desired during confinement facility phone and visiting hours. The confinement facility also provided defense counsel with special accommodations. *See* Government Response to Article 13.

The defense also alleges that the delay in discovery has impacted his ability to prepare for trial. The defense's argument has no merit and the defense provides no evidence to support this claim. As explained above, the complexities of the case, coupled with the scope and volume of defense discovery requests, required significant government action before all discovery was available to the defense. Further, to the contrary, the prosecution's proactive discovery efforts better enabled the accused to prepare his defense. The prosecution, *sua sponte*, submitted preservation requests to more than a dozen government organizations. Additionally, based on the defense's preservation request submitted one year after the accused's brigade returned to Fort Drum, the prosecution immediately executed specific preservation requests for material from Iraq. *See* Enclosure 52. The defense hypothesizes that discovery has been lost; to the contrary, from the onset of this case, information has been preserved. The discovery already provided to the defense has resulted in additional defense discovery requests. These continued requests reveal that the defense valued the discovery they received and were willing to wait based on the possibility of the existence of more discoverable information.

Lastly, the prosecution presented its entire case to the defense on two occasions before the Article 32 investigation. *See* Enclosure 44. The defense acknowledged the terms of the presentations. *See* Enclosure 76. On 8 November 2011, the prosecution presented its case, specifically how it intended to prove the charges and what damage, if any, the accused's misconduct has caused, to all defense counsel. This included the prosecution's charging theory and planned method to prove the offenses. Then, based on a defense request, the prosecution

presented its case (merits and presentencing) again to Mr. Coombs and the accused on 11 November 2011. To date, including the Article 32 investigation, the prosecution has presented its case to the defense on three separate occasions, thus eliminating any surprise and providing the defense ample opportunity to understand the information involved in this complex case and submit specific discovery requests, if they so chose.

For these reasons, the accused has suffered no prejudice tantamount to an Article 10 violation.

CONCLUSION

For the reasons stated above, the prosecution respectfully requests this Court deny the Defense Motion to Dismiss for Lack of Speedy Trial because there has been no violation of the accused's right to a speedy trial under RCM 707, Article 10, or the Sixth Amendment.

J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 16 November 2012.

J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel